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In The

Supreme Court of the United States

October Term, 1994

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION,

Petitioner,

vs.

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, AND THE STATE OF TEXAS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a private party who owns real property under state law seek to vindicate its constitutionally protected property rights by way of an action under 42 U.S.C. § 1983 for prospective declaratory and injunctive relief against a state official who wrongfully occupies and controls the property under color of the state's claim of ownership?

LIST OF PARTIES

The parties to the proceeding in the Court of Appeals for the Fifth Circuit were Petitioner The John G. and Marie Stella Kenedy Memorial Foundation, and Respondents Garry Mauro (in his official capacity as Commissioner of the General Land Office of Texas) and the State of Texas.

This action was originally commenced by Petitioner in a state district court in Kenedy County, Texas. Respondents removed the action to the United States District Court for the Southern District of Texas, Corpus Christi Division. Petitioner and Respondents have been the only parties to this action since its inception.

Petitioner The John G. and Marie Stella Kenedy Memorial Foundation has no parent entities, subsidiaries, or affiliates to list pursuant to Rule 29.1.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner The John G. and Marie Stella Kenedy Memorial Foundation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled proceeding on May 27, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 21 F.3d 667, and is reproduced in the Appendix at p. A1.

The United States District Court for the Southern District of Texas (the Honorable H.W. Head, Jr., District Judge) wrote an opinion in issuing its Order of Dismissal, which was entered on October 1, 1992. This opinion was not published, and it is reproduced in the Appendix at p. B1.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 27, 1994. On June 29, 1994, the Fifth Circuit denied the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United

States; *nor shall any state deprive any person of* life, liberty or *property without due process of law*; nor deny any person within its jurisdiction the equal protection of the laws. (Emphasis added).

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. For the purposes of this Section, any Act of Congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.

STATEMENT OF THE CASE

This case raises the critical issue of whether a private party may use 42 U.S.C. § 1983 to vindicate its constitutionally protected rights in real property against a state official who is wrongfully occupying the property under color of the state's claim of ownership. For years, decisions by this Court have answered this question in the affirmative. Under the Court of Appeals' ruling in this case, however, a private owner may not seek prospective declaratory and injunctive relief against the official because, according to the Fifth Circuit, the state itself is the real party in interest if it has a colorable claim to the

property. According to the ruling of the District Court that the Fifth Circuit affirmed, the issue does not even present a federal question, because rights in real property are governed by state law.

The Fifth Circuit's decision, like the ruling of the District Court, holds that property rights may exist only at the pleasure of the state and its officers. The Fifth Circuit's opinion, like the holding of the District Court, could easily deny a private owner any avenue for redress. The Fifth Circuit's decision is so contrary to the jurisprudence of this Court and of other Circuits concerning the most fundamental rights that a writ of certiorari should issue.

Petitioner The John G. and Marie Stella Kenedy Memorial Foundation (the "Foundation") owns coastal property in south Texas that includes parts of original Spanish and Mexican land grants commonly known as the Barreta grants. The eastern boundary of the Barreta grants is the Laguna Madre, which lies between the Texas mainland and Padre Island. The shoreline of the Barreta grants extends for approximately 15 miles. (Appendix at p. B1).

Land submerged by the Laguna Madre belongs to Respondent the State of Texas (the "State"), and is administered by Respondent Garry Mauro ("Mauro") in his official capacity as Commissioner of the General Land Office. Fast land bordering the Laguna Madre belongs to littoral property owners. The boundary is defined by the present shoreline, which is subject to natural change.

The Foundation has substantial evidence that approximately 35,000 acres bordering the Laguna Madre

(the "Disputed Land") is now actually fast land and hence part of its property. The State, however, claims the Disputed Land as part of its submerged property. The Foundation's rights in the Disputed Land are at issue in this case. (Appendix at pp. B1-B3).

In 1984, the Foundation commissioned a survey of its property, including the Barreta grants. In 1986, the surveyors submitted a final report certifying that all of the Disputed Land lies above the level of mean higher high tide, which is the shoreline boundary. The Foundation shared these results with Mauro and other officials of the State. Respondents, however, refused to acknowledge the Foundation's claim of ownership, even though Respondents undertook no survey of their own.

The Foundation then attempted to obtain the consent of the Texas Legislature to bring a lawsuit to adjudicate the boundary. Mauro and other officials of the State repeatedly acknowledged that they had no data of their own by which to determine title to the Disputed Land, and that there was a substantial question as to where the boundary lay. Nonetheless, Respondents secured the defeat of consent resolutions that were introduced on the Foundation's behalf in the Texas Legislature in 1987 and 1989.

Thwarted at every turn, the Foundation brought suit against Respondents in January, 1990 in a state court in Kenedy County, where the Disputed Land is located. The Foundation asserted a claim for prospective declaratory and injunctive relief only against Mauro in his official capacity under 42 U.S.C. § 1983, maintaining that Mauro,

acting under color of state law, had deprived the Foundation of its property without due process of law. The Foundation also asserted various state law theories, including an inverse condemnation claim under the Texas Constitution. (Appendix at p. A2).

In February, 1990, Respondents removed the action to the United States District Court for the Southern District of Texas (the "District Court") on the basis of federal question jurisdiction. 28 U.S.C. §§ 1331, 1343, 1441. After removal, the Foundation amended its pleadings to assert a federal inverse condemnation claim under the Fifth and Fourteenth Amendments.

Respondents eventually moved for summary judgment on their affirmative defenses, including sovereign immunity under the Eleventh Amendment. The Foundation, in turn, moved for partial summary judgment on its claim that the Disputed Land is fast land.

In September, 1992, the District Court signed an Order of Dismissal. (Appendix at p. B1). The District Court determined that it had no jurisdiction over the Foundation's state law causes of action, and it dismissed them. (Appendix at pp. B4-B5). The District Court also determined that the Eleventh Amendment deprived it of jurisdiction over the Foundation's federal inverse condemnation claim, and it dismissed that action. (Appendix at p. B4). The District Court further held both that it lacked subject matter jurisdiction over the Foundation's § 1983 action against Mauro, and that the Foundation had failed to state a claim under that statute. According to the District Court, the Foundation's § 1983 claim actually alleged a violation of *state* law, not *federal* law, because the

ultimate question of rights in the Disputed Land turned on Texas property law. (Appendix at pp. B7-B15). Finally, the District Court denied the Foundation's motion for partial summary judgment. (Appendix at p. B5). After remembering that Respondents had removed the case, the District Court amended its Order of Dismissal in October, 1992, and remanded the state law claims to the Texas court. (Appendix at pp. B17-B19).

The Foundation appealed the dismissal of its § 1983 claim to the Fifth Circuit. While the federal appeal was pending, the Foundation reasserted its state law claims in the Texas court in Kenedy County. Respondents, however, secured the dismissal of those claims on sovereign immunity grounds. The Foundation appealed that dismissal, and the appeal is now pending before a state tribunal.

Moreover, while the appeal was pending before the Fifth Circuit, several of the State's oil and gas lessees whose leaseholds include portions of the Disputed Land commenced state law interpleader actions in a court in Travis County, Texas. Respondents and the Foundation were named as defendants. The Foundation cross-claimed against Respondents, asserting its rights to the Disputed Land. Respondents have not answered the cross-claim.

The Fifth Circuit requested post-submission briefing on these state court actions. Thus, the Fifth Circuit was well aware that there was no certainty that the Foundation would have any state forum for the adjudication of its claims, and that state law sovereign immunity might preclude the Foundation from seeking redress on any state law theory.

On May 27, 1994, the Fifth Circuit rendered its decision. The Court of Appeals held that the District Court had erred in reaching the merits of the action, and the Fifth Circuit vacated the District Court's denial of the Foundation's partial summary judgment motion. (Appendix at pp. A16-A17). The Fifth Circuit also held that the District Court had had no subject matter jurisdiction over the federal inverse condemnation claim, and that the District Court had properly dismissed that action rather than remanding it. (Appendix at pp. A15-A16).

Finally, the Court of Appeals held that the District Court had properly dismissed the Foundation's § 1983 claim, both because of a lack of subject matter jurisdiction under the Eleventh Amendment, and because of a failure to state a cognizable cause of action. According to the Fifth Circuit, the State itself was the real party in interest, even though Mauro was the named defendant. The Court of Appeals held that any award of possession of the Disputed Property to the Foundation would be tantamount to an award of retrospective damages against the State. The Fifth Circuit also held that, because the State had a colorable claim to the Disputed Land, no federal court had jurisdiction to adjudicate the § 1983 action. (Appendix at pp. A7-A15). Thus, the Fifth Circuit held that the Foundation could not seek relief in any federal or state forum under § 1983, even though it was uncertain whether other avenues for redress were available.

REASONS FOR GRANTING THE WRIT

I. To the extent that the Fifth Circuit intended to affirm the District Court's ruling that a dispute between a private party and a state official involving the right to possession of real property cannot present a federal question or implicate a constitutionally protected right because questions of rights in real property are governed by state law, the Fifth Circuit's ruling conflicts with decisions by this Court and by other Circuits.

The Fifth Circuit affirmed the District Court's decision under Fed. R. Civ. P. 12(b)(1),(6) to dismiss the Foundation's § 1983 action against Mauro for lack of subject matter jurisdiction and for failure to state a valid claim. The rationale that the District Court gave for its ruling was that questions concerning ownership of the Disputed Land are governed by Texas law, and therefore that the Foundation had failed to allege that it had been deprived of a right guaranteed by federal law. Moreover, under the Eleventh Amendment, a federal court has no jurisdiction to order a state official to obey state law as such. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 119-23, 104 S. Ct. 990, 918-20, 79 L. Ed. 2d 67 (1984) ("*Pennhurst II*"). The Fifth Circuit's final opinion did not expressly address the District Court's reasoning. To the extent that the Fifth Circuit meant to endorse the position that the District Court had taken, however, its ruling is contrary to decisions by this Court and by other Circuits.

The Fourteenth Amendment is designed to protect property rights against the arbitrary actions of a state and its officers. "Property" consists of mutual or law-backed

expectations or understandings that give rise to a legitimate claim of entitlement. *Kaiser Aetna v. United States*, 444 U.S. 164, 178-79, 100 S. Ct. 383, 392-93, 62 L. Ed. 2d 332 (1979). The Constitution *ex proprio vigore* neither establishes nor defines any property rights, however. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972). Thus, the Fourteenth Amendment protects property interests that it does not create. *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, ___, 112 S. Ct. 2886, 2901, 120 L. Ed. 2d 798 (1992).

In any federal claim alleging a deprivation of property without due process of law, the first analytical step is to determine whether the claimant has a colorable property interest. This will always involve a source of property rights independent of the Constitution. In the case of real property, the inquiry will involve state law. *Lucas*, ___ U.S. at ___-___, 112 S. Ct. at 2899-2901. Once it has been determined that the claimant has a colorable state law property interest, the questions whether the actions of state officials rise to the level of a deprivation, and, if so, whether the claimant has been denied due process, are federal law issues. *Id.*, ___ U.S. at ___-___, 112 S. Ct. at 2892-93.

This Court has consistently held that the Fourteenth Amendment and 42 U.S.C. § 1983 are designed precisely to prevent a state and its officers from flouting the understandings and expectations that the state's own property law creates. *Lucas*, ___ U.S. at ___, n.7, ___-___, 112 S. Ct. at 2896 n.7, 2899-2901; *Dennis v. Higgins*, 498 U.S. 439, 443-46, 111 S. Ct. 865, 868-70, 112 L. Ed. 2d 696 (1991).

Having established such expectations, a state and its officials may not set the state's own property law at naught. *Federal law* prohibits a sovereign or its officers from expropriating state-created property rights arbitrarily. *Lucas*, ___ U.S. at ___, 112 S. Ct. at 2901; *accord United States v. Lee*, 106 U.S. (16 Otto), 196, 208-09, 221, 1 S. Ct. 240, 250-51, 261, 27 L. Ed. 141 (1882). Federal protection for real property rights created by state law is especially vigorous. *Kaiser Aetna*, 444 U.S. at 178-80, 100 S. Ct. at 392-93.

Other Circuits have likewise held that the need to ascertain state law governing property rights is no obstacle either to stating a federal claim or to federal court jurisdiction, because federal law incorporates and vindicates state law property rights. Other Circuits have noted that this Court's holding in *Pennhurst II* only prohibits a federal court from ordering state officials to obey state law *qua* state law; when a rule of federal law – such as the constitutional protections afforded to private property – incorporates state law, then *Pennhurst II* has no application. *E.g., Mont v. Heintz*, 849 F.2d 704, 709-10 (2d Cir. 1988); *Everett v. Schramm*, 772 F.2d 1114, 1119 (3d Cir. 1985). Recently, the Sixth Circuit has expressly held that the fact that a court must look to state law to determine the claimant's property rights does not mean that a claim for deprivation of property without due process presents only a state law issue. In such a case, a § 1983 action for prospective relief against state officials will lie, and the claim will not be barred by *Pennhurst II*. *Williams v. Commonwealth of Kentucky*, 24 F.3d 1526, 1543-44 (6th Cir. 1994).

II. The Fifth Circuit's ruling that a claim for prospective declaratory and injunctive relief against a state official may be dismissed for failure to allege a valid claim under 42 U.S.C. § 1983, and for lack of federal subject matter jurisdiction, on the basis of piercing the pleadings, examining the prayer for relief, and purporting to determine that the state itself is the real party in interest, conflicts with decisions by this Court and by other Circuits.

The Fifth Circuit affirmed the District Court's decision to dismiss the Foundation's § 1983 claim for prospective declaratory and injunctive relief against Mauro both on Eleventh Amendment jurisdictional grounds and on the basis of the Foundation's supposed failure to state a proper claim under 42 U.S.C. § 1983. Fed. R. Civ. P. 12(b)(1),(6). The Court of Appeals ostensibly looked only to the gravamen of the pleadings. The Fifth Circuit expressly held that summary judgment under Fed. R. Civ. P. 56 was not appropriate, and that the District Court had had no jurisdiction to reach any summary judgment issue. (Appendix at pp. A16-A17).

The Court of Appeals in fact reached its decision by piercing the Foundation's pleadings, looking to the Foundation's prayer for relief, and concluding that the Foundation was seeking a judgment against the State itself. Under the Eleventh Amendment, a state may not be sued by a private party in a federal court without the state's consent, and a state is not a "person" within the meaning of 42 U.S.C. § 1983. The Fifth Circuit concluded that the Foundation had failed to allege a cognizable § 1983 action, and that no federal court had any subject matter

jurisdiction to entertain the Foundation's claim against Mauro, because, according to the Fifth Circuit, the State itself was the "real" defendant. (Appendix at pp. A7-A15).

Although the questions of federal subject matter jurisdiction and of stating a viable claim under § 1983 are distinct, they are closely related. *Keniston v. Roberts*, 717 F.2d 1295, 1298-1302 (9th Cir. 1983). The Fifth Circuit did not distinguish the two issues. To invoke federal question jurisdiction (or to state a claim under § 1983), a claimant need only allege an entitlement to redress for a violation of federally guaranteed rights, and the claim must not be obviously frivolous. *See Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 U.S. 15, 21 n.6, 102 S.Ct. 2202, 2206 n.6, 72 L. Ed. 2d 639 (1982).

This Court has had little patience with the summary dismissal of § 1983 actions under Fed. R. Civ. P. 12(b). All facts that the claimant has alleged must be taken as true. *Zinermon v. Burch*, 494 U.S. 113, 118, 110 S. Ct. 975, 979, 108 L. Ed. 2d 100 (1980). Dismissal is appropriate only if it appears certain that the claimant can adduce no set of facts that would provide a basis for a federal court to grant any relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957).

A. The Fifth Circuit's procedure in piercing the pleadings in sustaining the dismissal of a claim, conflicts with this Court's decisions.

Judged by these standards, the Fifth Circuit's procedure in the present case conflicts with other federal

appellate holdings in at least four respects. First, this Court has held that the claimant's pleadings may not be pierced in deciding a motion to dismiss. *Zinermon*, 494 U.S. at 118, 110 S. Ct. at 979. All allegations must be liberally construed in the claimant's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S. Ct. 1843, 1848, 23 L. Ed. 2d 404 (1969). Here, the Foundation plainly alleged that it owned the Disputed Land, and that Mauro, acting under color of state law, had deprived the Foundation of its property without due process of law. Not merely did the Court of Appeals go beyond the Foundation's assertions; the Court of Appeals accepted as true *Respondents'* assertion that the State had a colorable claim to the Disputed Land.

B. The Fifth Circuit's procedure in looking to the prayer for relief in order to determine the gravamen of a claim in order to uphold the dismissal of the claim, conflicts with decisions by other Circuits.

Second, by looking to the Foundation's prayer for relief, the Fifth Circuit purported to determine that the Foundation was attempting to use its § 1983 claim to obtain a judgment for title to the Disputed Land that would bind the State. This sort of analysis is diametrically opposed to the approach taken by other Circuits, which have held that the plaintiff's prayer for relief should *not* be considered in weighing whether to dismiss a claim. A claimant is entitled to any relief that the facts and the law may justify, irrespective of the relief for which the claimant may have prayed. According to other Circuits, a prayer for relief is irrelevant in deciding

a motion to dismiss. *Doe v. United States Dept. of Justice*, 753 F.2d 1092, 1104 (D.C. Cir. 1985); *Norwalk CORE v. Norwalk Redev. Agency*, 395 F.2d 920, 926 (2d Cir. 1968).

C. The Fifth Circuit's conclusion that an action for possession of property against a sovereign's officer, wherein the sovereign's title may be placed in issue, is necessarily equivalent to seeking an adjudication of title binding against the sovereign itself, conflicts with decisions by this Court.

Third, the Fifth Circuit ignored the jurisprudence of *Ex parte Young*, 209 U.S. 123, 159-60, 28 S. Ct. 441, 454, 52 L. Ed. 714 (1908). The Foundation stated clearly that its § 1983 claim was brought against Mauro in his official capacity only, and not against the State itself. Under the fiction of *Ex parte Young*, a state official who has violated the claimant's constitutional rights is stripped of any representative capacity. All privity between the state and the official is severed. Consequently, a judgment for prospective declaratory or injunctive relief against the official is not deemed a judgment against the state. *Papasan v. Allain*, 478 U.S. 265, 276-77, 106 S. Ct. 2932, 2939-40, 92 L. Ed. 2d 209 (1986). An action for prospective relief against a state officer may be brought under 42 U.S.C. § 1983. *Hafer v. Melo*, 502 U.S. 21, ___, 112 S. Ct. 358, 363, 116 L. Ed. 2d 301 (1991).

When a private party alleges that a government official has expropriated his or her property under color of the sovereign's claim of right or title, and has done so without due process of law, this Court has long held that the private party may bring an action against the official to obtain

possession of the property. *Lee*, 106 U.S. (16 Otto) at 218, 1 S. Ct. at 259-62. The official may indeed try to show that the sovereign has good title, and thus that continued possession of the disputed property by the official does not violate the Constitution. If the officer prevails, then privity between the officer and the sovereign will be established, and the sovereign may take advantage of the preclusive effect of the judgment. *Land v. Dollar*, 330 U.S. 731, 738-39, 67 S. Ct. 1009, 1012-13, 91 L. Ed. 1209 (1947). If the claimant prevails, however, all privity between the official and the state is destroyed, and therefore the state is not bound by the judgment. *Tindal v. Wesley*, 167 U.S. 204, 221-23, 17 S. Ct. 770, 777-78, 42 L. Ed. 137 (1897).[1] Accordingly, an *in personam*

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[1] The Fifth Circuit believed that *Tindal* had been completely overruled by *Larson v. Domestic & Foreign Service Corp.*, 337 U.S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949). As this Court has observed, however, *Larson* "overruled" *Tindal* only in a very narrow and attenuated sense. Under *Larson*, an action against a state official for prospective declaratory and injunctive relief will not lie if all that the plaintiff has alleged is a common law tort or a mere violation of state law in the execution of the official's duties. In *Tindal*, the plaintiff may have alleged no more than a common law trespass. *See Pennhurst II*, 465 U.S. at 109 n.19, 110-114, 104 S. Ct. at 913 n.19, 913-15. On the other hand, the *Larson* Court implicitly reaffirmed the bedrock principle of *Tindal*: that if the plaintiff claims title to property that an official is holding under color of the sovereign's claim of right – *i.e.*, if the official's action amounts to a government sanctioned taking – then an action for prospective relief against the official will lie. *See Larson*, 337 U.S. at 696-98, 69 S. Ct. at 1464-65. Moreover, well after *Larson*, both this Court and other Circuits have continued to cite *Tindal* as good law. *E.g.*, *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685, 697, 102 S. Ct. 3304, 3315, 3321, 73 L. Ed. 2d 1057 (1982); *Kozera v. Spirito*, 723 F.2d 1003, 1008-09 (1st Cir. 1983).

judgment against a sovereign's officer declaring that the claimant has superior title has no preclusive effect on the sovereign. The sovereign may bring a later action to vindicate its ownership. What the claimant may gain is a superior right to possession as against the official, not superior title as against the state. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685-86, 697-700, 102 S. Ct. 3304, 3314-16, 3321-22, 73 L. Ed. 2d 1057 (1982).

The Fifth Circuit purported to find support for its position in *Toledo, Peoria & Western R. Co. v. State of Illinois, Dept. of Transp.*, 744 F.2d 1296 (7th Cir. 1984), *cert. denied*, 470 U.S. 1051, 105 S. Ct. 1751, 84 L. Ed. 2d 815 (1985). There, a railroad brought a § 1983 action against an agency of the State of Illinois, which was tantamount to naming the state *eo nomine* as a defendant. The railroad sought an adjudication that the state had abandoned an easement in the railroad's property. The district court ordered the State of Illinois itself "to relinquish its claim to any interest in the property." *Id.* at 1298.

The Seventh Circuit reversed. A state is not a "person" for purposes of § 1983, and a federal court has no jurisdiction to entertain a claim by a private party against an unconsenting state. *Id.* at 1297, 1299. The Seventh Circuit also held that an adjudication of title that ostensibly bound the state itself was equivalent to an award of retrospective damages. *Id.* at 1299 n.1.

The Fifth Circuit misapplied the Seventh Circuit's decision by concluding that the Foundation sought a judgment that would bind the State of Texas, and that any judgment against Mauro necessarily would be equivalent to ordering the State itself "to relinquish its claim to any

interest in the property." *Toledo, Peoria*, 744 F.2d at 1298. The Fifth Circuit's misplaced reliance on the Seventh Circuit's holding merely illustrates the Fifth Circuit's failure to comprehend this Court's doctrine that a suit against an officer of a despotic and recalcitrant sovereign is by no means the same thing as a suit against the sovereign itself.

No decision by this Court has ever declared that any doctrine of sovereign immunity renders a deprivation of private real property unredressable by way of an action based on the principles of *Lee* and *Ex parte Young*. A claimant may bring an action for prospective declaratory and injunctive relief against the official in possession, and the claimant may assert his or her superior title in so doing, even if an adjudication of title as against the sovereign itself may be barred. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1525-26 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 113, 105 S. Ct. 2353, 86 L. Ed. 2d 255 (1985); *see Hirtz v. State of Texas*, 974 F.2d 663, 665 (5th Cir. 1992).

D. The Fifth Circuit's ruling that a judgment against a Texas official awarding possession of disputed property to a claimant would necessarily be a judgment against the State itself because of the ancillary impact upon the state's treasury that the judgment might have, is in conflict with decisions by this Court.

The Fifth Circuit believed that any judgment declaring that the Foundation had a superior right to possession of the Disputed Land would have an impact on the State. Accordingly, the Fifth Circuit concluded that the

Foundation's § 1983 claim against Mauro was equivalent to seeking damages for past wrongs against the State. A state officer acting in his or her official capacity is not a "person" for purposes of § 1983 if the claim is for monetary damages. *Hafer*, 502 U.S. at ___, 112 S. Ct. at 358. Furthermore, as a matter of jurisdiction, the Eleventh Amendment prohibits any suit in a federal court that seeks to recover retrospective damages from a state's treasury. Therefore, the Court of Appeals held that the Foundation's § 1983 action was barred. (Appendix at pp. A10-A12).

The Fifth Circuit's ruling conflicts with this Court's decisions in several respects. First, even if the Court of Appeals had been correct in considering the Foundation's prayer for relief, the Foundation did not seek retrospective damages or just compensation under its § 1983 claim. The Foundation prayed only for prospective relief with respect to the Disputed Land as against Mauro.

Any impact on the State's treasury, therefore, would be purely ancillary to the prospective relief. This Court has held that such an ancillary impact on the public purse, no matter how great it may be, is entirely permissible in an *Ex parte Young* action. *Papasan*, 478 U.S. at 278-79, 106 S. Ct. at 2940-41; *Edelman v. Jordan*, 415 U.S. 651, 658, 94 S. Ct. 1347, 1358, 39 L. Ed. 2d 662 (1974). Indeed, this Court has expressly held that an award of possession of specific property is *not* equivalent to an award of damages against a state. *Treasure Salvors*, 458 U.S. at 699, 102 S. Ct. at 3322.

The Fifth Circuit, then, placed itself squarely on a collision course with the decisions of this Court and of

other Circuits, both in the procedures that it used in purporting to determine that the State was the "real" party defendant under the Foundation's § 1983 claim, and in concluding that an action for prospective declaratory and injunctive relief against a Texas official is necessarily tantamount to an action seeking an adjudication of title that will bind the State itself. Ultimately, the Court of Appeals held that 42 U.S.C. § 1983 and *Ex parte Young* may not be used to redress a government expropriation of real property if title to the property is disputed in any way. This Court has held, on the contrary, that a federal cause of action for declaratory and injunctive relief against state officials must be available, particularly when it is not clear that any state law remedy is open to vindicate constitutionally protected rights. *General Oil Co. v. Crain*, 209 U.S. 211, 226-27, 28 S. Ct. 475, 480, 58 L. Ed. 754 (1908). The Fifth Circuit's decision is so aberrational, and the issue is of such importance, that a writ of certiorari should issue.

III. The Fifth Circuit's ruling that an action against a state official under 42 U.S.C. § 1983 for prospective relief and for possession of real property will not lie if the state has a colorable claim to the disputed property, conflicts with decisions by this Court and by other Circuits.

A. The Fifth Circuit's ruling that a test devised to determine whether a federal court may seize property in order to establish its *in rem* jurisdiction may be applied to an *in personam* action against a state official, conflicts with decisions by this Court and by other Circuits.

In an action alleging that a government official has deprived the claimant of property without due process of

law, the rule followed in most Circuits is that, at the stage of a motion to dismiss, all that the *claimant* must do is allege some colorable property interest that is not wholly insubstantial on its face. The strength of that alleged interest should await an adjudication on the merits. *E.g.*, *Keniston*, 717 F.2d at 1299; *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038, 1041-42 (11th Cir. 1982).

Ostensibly relying on this Court's holding in *Treasure Salvors*, however, the Fifth Circuit declared that if a *state* has a colorable claim to disputed property, and if the defendant officer is colorably authorized by the state to hold that property, then a § 1983 action against the state official for declaratory and injunctive relief seeking possession of the property will not lie. The official will necessarily interpose the validity of the state's claim as a defense. The Fifth Circuit concluded that, unless a state's claim to the property is facially frivolous, attempting such a procedure in a federal court violates the Eleventh Amendment. (Appendix at pp. A12-A15).

This conclusion conflicts with decisions by this Court and by other Circuits, in part because the Fifth Circuit misapprehended the fiction of *Ex parte Young*. The Fifth Circuit also placed itself in conflict with holdings by this Court and by other Circuits in failing to understand the very nature of the issues at stake in *Treasure Salvors*.

The Fifth Circuit ignored that *Treasure Salvors* was an *in rem* admiralty action that presented no fewer than three distinct questions. The most important of these was the validity of the arrest warrant that transferred the disputed property to the custody of the district court *pendente lite*.

In an *in rem* admiralty action, a federal court's jurisdiction is established by a seizure of the vessel or other property, which is thereby placed *in custodia legis* until all claims to and against the *res* have been adjudicated. "To obtain jurisdiction to proceed to a decree *in rem* in admiralty, it is essential that the *res* come into the *possession of the court by seizure* under adequate warrant of arrest." *Yokohama Specie Bank, Ltd. v. Chengting T. Wang*, 113 F.2d 329, 331 (9th Cir.) (emphasis added), *cert. denied*, 311 U.S. 690, 61 S. Ct. 71, 85 L. Ed. 466 (1940). Consequently, any party who claims to own the vessel or other property is deprived of it *pendente lite*. The property has been *expropriated by the federal court* until the litigation has been decided. *See Neopolitan Navigation, Ltd. v. Tacor Marine, Inc.*, 777 F.2d 1427, 1430 (11th Cir. 1985).

In *Treasure Salvors*, this feature of an admiralty arrest warrant was complicated by the fact that state officials purported to hold the disputed property under the state's ostensible claim of right. There are obvious Eleventh Amendment problems when a federal court seizes property allegedly owned by a state from state officials. The central issue in *Treasure Salvors*, then, went to a dispute *between the district court on one side, and the state officials on the other*: could the district court, consistent with the Eleventh Amendment, seize the *res* from the state officers, who claimed that the *res* was state property, and hold the *res* until all claims to the property had been adjudicated? *Treasure Salvors*, 458 U.S. at 682-83, 697, 102 S. Ct. at 3313-14, 3321.

This Court upheld the district court's *in rem* jurisdiction. In so doing, this Court applied the "colorable claim" test that the Fifth Circuit purported to use. First, the State

of Florida had no colorable claim to the disputed property. Second, the state officials had no colorable claim that the State of Florida or state law had authorized them to take possession of the *res*. Accordingly, by seizing the property *pendente lite*, the district court was not in any way interfering with the state's rights. *Treasure Salvors*, 458 U.S. at 694, 696, 699-700, 102 S. Ct. at 3319, 3320, 3322.

The principle of the colorable claim test has no application whatsoever in this case. The Foundation did not ask the District Court to seize the Disputed Land from Mauro and to place it *in custodia legis* pending the resolution of the case. The relief that the Foundation seeks under its § 1983 claim is purely *in personam* against Mauro.

Other Circuits have realized that the *Treasure Salvors* colorable claim test went to the question of the validity of an arrest warrant in an *in rem* action – *i.e.*, to a dispute as to whether a federal court could seize property, rather than to a dispute involving a federal court's jurisdiction to enter an *in personam* decree against a state official. *E.g.*, *Zych v. Wrecked Vessel Believed to be the "Lady Elgin"*, 960 F.2d 665, 669-70 (7th Cir.), *cert. denied*, ___U.S.___, 113 S. Ct. 1491, 121 L. Ed. 2d 430 (1992); *Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked and Abandoned Vessel*, 717 F.2d 6, 8 (1st Cir. 1983). In failing to comprehend the context in which this Court's colorable claim test was meant to apply, the Fifth Circuit placed itself in conflict with the manner in which other Circuits have correctly interpreted *Treasure Salvors*.

Two other questions – apart from the validity of the arrest warrant – were at issue in *Treasure Salvors*. One was

whether the district court was prohibited by the Eleventh Amendment from adjudicating the title of the State of Florida to the disputed property. This was a jurisdictional issue involving the rights of the state itself and of the federal court, irrespective of the rights of the state officials, and irrespective of whether the proceedings were *in personam* or *in rem*. This Court concluded that the district court had had no jurisdiction to adjudicate the state's title to the property by entering a judgment that would bind an unconsenting sovereign as such. *Treasure Salvors*, 458 U.S. at 697, 699-700, 102 S. Ct. at 3321, 3322.

This aspect of the *Treasure Salvors* holding, however, had nothing to do with the colorability of the state's claim. Other Circuits have held that the mere existence of a state's claim to specific property prohibits a federal court from entering an adjudication of ownership that actually will bind the state, irrespective of the strength of the claim. Even in admiralty *in rem* actions, other Circuits have held that a federal court may enter a judgment of title that will bind all the world besides, but not an unconsenting state. *"Lady Elgin"*, 960 F.2d at 670; *Maritime Underwater Surveys*, 717 F.2d at 8.

The Fifth Circuit suggested that the colorability of the State's claim to the Disputed Land prevented a federal court from adjudicating the State's rights. This is in conflict with *Treasure Salvors* and with the holdings of other Circuits. The District Court had no jurisdiction to make an adjudication of title that would have had a preclusive effect on the State, regardless of the colorability of the State's claim. The Foundation sought no such adjudication under its § 1983 action.

The third issue in *Treasure Salvors* was whether the district court could award *possession* of the disputed property to the claimants. This issue involved a *dispute between the claimants and the state officials*. This Court answered that question in favor of the claimants, relying on *Ex parte Young*, *Lee*, and *Tindal*. In resolving this question, however, the colorability of the state's claim to the property went to the *merits* of who ultimately should be awarded possession, *not to the jurisdiction of the district court* or to the question of an Eleventh Amendment bar. *Treasure Salvors*, 458 U.S. at 690-700, 102 S. Ct. at 3317-22; *see id.*, 458 U.S. at 694-90, 102 S. Ct. at 3314-17. Moreover, the resolution of this issue did not depend on whether the action happened to be *in personam* or *in rem*.

This analysis is consistent with the decisions of other Circuits, which have held that, even in an *in rem* admiralty action, a federal court may enter a judgment as to the ownership of disputed property that will bind the whole world except an unconsenting state. *"Lady Elgin"*, 960 F.2d at 669-70; *see Maritime Underwater Surveys*, 717 F.2d at 8. The parties that such a judgment could bind would include state officials, although the sovereign as such would not be bound.

B. In holding that title to disputed littoral property had been "effectively adjudicated" in an action brought over forty years ago, despite supervening changes in both the facts and the law, the Fifth Circuit placed itself in conflict with the holdings of other federal courts and of state courts as well.

Even on its own terms, the Fifth Circuit's conclusion as to the colorability of the State's claim to the Disputed

Land was in conflict with holdings by other federal courts and with state court decisions. The Fifth Circuit believed that its own opinion in *Humble Oil & Refining Co. v. Sun Oil Co.*, 190 F.2d 191 (5th Cir.), *reh'g denied*, 191 F.2d 705 (5th Cir. 1951), *cert. denied*, 342 U.S. 920, 72 S. Ct. 367, 96 L. Ed. 687 (1952), had "effectively adjudicated" title to the Disputed Land in favor of the State. (Appendix at pp. A2, A14). *Humble Oil* involved, *inter alia*, one of the State's lessees and the Foundation's predecessor-in-interest; no Texas official was a party, and the Fifth Circuit held that the State itself should not have been allowed to intervene. Quite apart from the fact that *Humble Oil* only involved certain tracts of the Disputed Land, however, the Fifth Circuit ignored controlling and persuasive authority in believing that its own prior judgment still had any force.

First, the Fifth Circuit overlooked the fact that the Disputed Land is *littoral* property, and hence that its boundary is subject to natural change. Under Texas law, when the area of fast land expands, either through the depositing of new sediment (accretion) or through the receding of the water (reliction), the littoral owner's property expands. Conversely, when the shoreline is washed away (erosion) or when the water level rises (submergence), the littoral owner's property diminishes. The present shoreline is the boundary. *E.g.*, *Rudder v. Ponder*, 156 Tex. 185, 293 S.W.2d 736, 742-43 (1956); *see Nebraska v. Iowa*, 143 U.S. 359, 360-70, 12 S. Ct. 396, 397-400, 36 L. Ed. 186 (1892).

Here, the Foundation has not merely alleged, but also adduced substantial evidence, that the area of fast land

had expanded since *Humble Oil* was decided. Consequently, the Foundation's littoral property had expanded, while the State's submerged property had diminished accordingly.

Every state and federal court that has addressed analogous facts has held that a previous boundary adjudication has no preclusive force. When a boundary is littoral or riparian – *i.e.*, when it is subject to natural change – then a prior boundary judgment cannot remain binding if the boundary has shifted. *101 Ranch v. United States*, 714 F. Supp. 1005, 1007, 1011 (D.N.D. 1988), *aff'd*, 905 F.2d 180 (8th Cir. 1990); *Sotomura v. County of Hawaii*, 460 F. Supp. 473, 482 (D. Hawaii 1978); *see, e.g., Pankratz v. State Dept. of Highways*, 652 P.2d 68, 73-74 (Alaska 1982). In other words, when the littoral or riparian owner's title accrues *after* the prior judgment, then the earlier judgment has no force. *See United States Gypsum Co. v. Greif Bros. Cooperage Corp.*, 389 F.2d 252, 261 (8th Cir. 1968); *see also, e.g., Oklahoma v. Texas*, 272 U.S. 21, 36-42, 47 S. Ct. 9, 14-16, 71 L. Ed. 145 (1926); *Nebraska v. Iowa*, 143 U.S. at 360-70; 12 S. Ct. at 397-400. Indeed, the Attorney General of Texas has argued successfully that coastal boundaries are inherently subject to relitigation, because they are subject to natural change. *Matcha v. Mattox*, 711 S.W.2d 95, 99-100 (Tex. App. – Austin 1986, writ ref'd n.r.e.), *cert. denied*, 481 U.S. 1084, 107 S. Ct. 1911, 95 L. Ed. 2d 517 (1987). Genuflecting before a prior boundary adjudication when there is substantial evidence that the boundary has shifted since that judgment was entered is contrary to state law and to federal common law.

Second, the federal courts deciding *Humble Oil* incorrectly forecast Texas littoral boundary law. Following *Erie*

R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), the Fifth Circuit in *Humble Oil* guessed as to how Texas law would determine the boundary between the land submerged by the Laguna Madre (which is owned by the State) and the fast land (which is owned by the littoral proprietors). The Court of Appeals concluded that the Texas Supreme Court would adopt the single highest tide in winter as the boundary. *Humble Oil*, 190 F.2d at 195.

A few years later, however, the Texas Supreme Court concluded that the littoral boundary of Spanish or Mexican land grants (such as the Foundation's property) must be determined by the level of mean higher high tide, which is the average of the daily high tides calculated over a cycle of approximately 19 years. *Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167, 174, 191 (1958). The effect of the *Luttes* holding is to allow more property to the littoral owner and less to the State than the test that the *Humble Oil* court guessed that Texas law would apply.

A strong case for supervening changes in both factual circumstances and in the controlling law, then, make the State's claim to the Disputed Land far less than ironclad. The Foundation submits that it has a colorable claim to the Disputed Land. This is all that is needed to invoke valid federal jurisdiction over the claim for prospective relief against Mauro, and to state a cause of action under 42 U.S.C. § 1983.

CONCLUSION

The Fifth Circuit's opinion, like the District Court's ruling that the Fifth Circuit affirmed, is a false beacon, misguiding lower courts and potentially misleading other Circuits on the jurisprudence of 42 U.S.C. § 1983. The reasoning that this Court has employed in other cases stands in marked contrast to the result that the Court of Appeals reached here. Furthermore, the important and troublesome issues posed by the Fifth Circuit's decision call for resolution by this Court. Otherwise, property rights may exist only at the whim of an arbitrary sovereign. For the reasons set forth, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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The JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION,
Plaintiff-Appellant,

v.

Garry MAURO, Commissioner of the General Land Office, et al.,
Defendants-Appellees.

No. 92-7714

United States Court of Appeals,
Fifth Circuit.

May 27, 1994.

Rehearing Denied June 29, 1994.

Before KING and BARKSDALE, Circuit Judges, and PARKER,* District Judge.

KING, Circuit Judge:

The John G. and Marie Stella Kenedy Memorial Foundation (the Foundation) appeals the district court's dismissal of its claim brought under 42 U.S.C. § 1983 against Garry Mauro (Mauro), Commissioner of the Texas General Land Office, in his official capacity, and its Fifth Amendment inverse condemnation claim against the State of Texas. The Foundation also appeals the district court's denial of its motion for partial summary judgment. We affirm the district court's judgment of dismissal and vacate that portion of the judgment denying the Foundation's motion for partial summary judgment.

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*Chief Judge of the Eastern District of Texas, sitting by designation.

I. BACKGROUND

In January 1990, the Foundation filed suit against Mauro and the State of Texas in Texas state court in Kenedy County, Texas. The Foundation sought declaratory and injunctive relief to determine boundary and title to certain real property against Mauro, in his capacity as Commissioner of the Texas General Land Office, under 42 U.S.C. § 1983 and the Fourteenth Amendment of the United States Constitution, as well as under state common law. The Foundation also asserted a takings claim against the State of Texas under Article I, Section 17 of the Texas Constitution.

The Foundation specifically contended that Mauro, acting under color of state law, refused to recognize the proper location of the boundary between the Foundation's property and state-owned land in Kenedy County. The property at issue is part of the original Spanish and Mexican grants, La Barreta and Las Motas de la Barreta, respectively, and is sometimes covered by the body of water known as the Laguna Madre. The Foundation argued that although title to portions of the disputed land had been effectively adjudicated to the State in *Humble Oil & Refining Co. v. Sun Oil Co.*, 190 F.2d 191 (5th Cir. 1951), *cert. denied*, 342 U.S. 920, 72 S.Ct. 367, 96 L.Ed. 687 (1952), there had since been a change in both the physical characteristics of the disputed land and in state law interpreting its physical boundaries by virtue of the Texas Supreme Court's holding in *Luttes v. State*, 324 S.W.2d 167 (Tex. 1959). Hence, according to the Foundation, an application of *Luttes* would establish that the State's claim to the disputed land was no longer valid. Although the Foundation conceded that Mauro had the statutory

authority to determine the boundary between private property and state-owned submerged land, Mauro's refusal to recognize *Luttes* as controlling – while he continued to grant mineral leases on a portion of the disputed property for the State's benefit – amounted to a deprivation of the Foundation's real property without due process of law.

In February 1990, Mauro and the State (the defendants) removed the case to the United States District Court for the Southern District of Texas on the basis of federal question jurisdiction. In its original answer filed in federal court, the defendants stated that the district court had subject matter jurisdiction over the Foundation's § 1983 claim against Mauro in his official capacity for prospective injunctive relief. However, the defendants denied that the court had jurisdiction over the remaining claims. The defendants then filed a motion for summary judgment. Specifically, they asserted (1) that the Foundation's claims were barred by res judicata, collateral estoppel, and stare decisis in light of the Fifth Circuit's decision in *Humble Oil;* (2) that the State of Texas was entitled to judgment as a matter of law with respect to the Foundation's claim under Article I, Section 17 of the Texas Constitution because title to the disputed property rested with the State; (3) that the Foundation's action was barred by limitations and under the doctrine of laches; (4) that the Foundation's state law claims against Mauro were barred by the doctrine of sovereign immunity; and (5) that the Foundation's claim against Mauro was not a cognizable claim under § 1983 and barred by the Eleventh Amendment.

The Foundation then amended its complaint to assert additionally an inverse condemnation claim against the State of Texas under the Fifth Amendment to the United States Constitution. In response to this amended complaint, the defendants filed an amended answer in which they denied that the relief sought by the Foundation for its § 1983 claim was proper prospective relief. The defendants also pleaded the various affirmative defenses raised in their earlier motion for summary judgment, as well as "sovereign immunity and the Eleventh Amendment to the U.S. Constitution."

The Foundation subsequently filed its own motion for partial summary judgment, seeking a judgment declaring that the disputed land was not "submerged" land owned by the State but rather land which belonged to the Foundation as part of its upland property. The Foundation also requested a ruling that its claims were not barred by res judicata or collateral estoppel.

After a hearing on the parties' cross-motions for summary judgment, the district court dismissed the entire suit for lack of subject matter jurisdiction and denied the Foundation's motion for partial summary judgment. The district court reasoned that the Foundation's state law claim against Mauro was barred by the Eleventh Amendment, as interpreted in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). The district court also determined that Mauro's actions, which formed the basis of the Foundation's § 1983 claim, were discretionary actions of an elected official acting under a state statute not challenged as unconstitutional. Accordingly, the district court concluded that the Eleventh Amendment barred the Foundation's § 1983 claim in

federal court because the claim was an action against a state official for a violation of state law and the relief requested was against the State, not Mauro. The district court further determined that the Foundation's state and federal takings claims against the State of Texas were barred by the Eleventh Amendment – specifically under the reasoning of *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978).

Several days later, the district court issued an order modifying this dismissal. The district court explained:

> . . . [W]hen this Court issued its Order of Dismissal, it overlooked the removed status of this litigation. Rather than dismiss for lack of jurisdiction all of plaintiff's federal *and* state causes of action against defendants, Garry Mauro, Commissioner of the General Land Office, and the State of Texas, it is the better judgment and the intention of the court to dismiss only those claims of plaintiff that are barred by the Eleventh Amendment of the United States Constitution. These are plaintiff's claims asserted against Commissioner Mauro and the State of Texas pursuant to 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments.
>
> All other claims the court remands to the 105th Judicial District Court, Kenedy County, Texas for its decision.

The district court thus dismissed both of the Foundation's federal claims, but remanded the state law claims to state court. The Foundation then filed a timely notice of appeal from the district court's order dismissing its federal

claims and denying its motion for partial summary judgment.[1]

II. STANDARD OF REVIEW

Although this court has no jurisdiction to review a district court's judgment which remands a cause of action to state court for lack of subject matter jurisdiction, see 28 U.S.C. § 1447(d); *McDemott Int'l Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1201-03 (5th Cir. 1991); *Mitchell v. Carlson*, 896 F.2d 128, 131 (5th Cir. 1990), any aspect of that judgment which is distinct and separable from the remand proper may be reviewed on appeal, *see City of Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140, 142-43, 55 S.Ct. 6, 7, 79 L.Ed. 244 (1934); *Mitchell*, 896 F.2d at 132; *see also J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267, 271 (7th Cir. 1990) (even if a district court has properly refused to exercise jurisdiction over pendent state law claims, the dismissal of federal claims giving rise to the removal is reviewable). Because the district court's dismissal of the Foundation's federal claims was separate and distinct from its remand of the Foundation's state law claims, this court has jurisdiction to review the dismissal of the Foundation's federal claims.

We review the district court's dismissal of federal claims for lack of subject matter jurisdiction *de novo*. *In re Bradley*, 989 F.2d 802, 804 (5th Cir. 1993); *Hobbs v. Hawkins*, 968 F.2d 471, 475 (5th Cir. 1992); *Benton v. United States*,

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[1] The Foundation has specifically disclaimed any intent to challenge the district court's decision remanding its state law claims to state court.

960 F.2d 19, 21 (5th Cir. 1992). We will not affirm the dismissal " 'unless it appears certain that the plaintiff cannot prove any set of facts in support of [its] claim which would entitle [it] to relief.' " *Hobbs*, 968 F.2d at 475 (quoting *Benton*, 960 F.2d at 21).

III. DISCUSSION

The Foundation raises three arguments on appeal. First, it contends that the district court erroneously dismissed its § 1983 claim for declaratory and prospective injunctive relief against Mauro in his official capacity. Second, the Foundation argues that the district court's disposition of its Fifth Amendment claim against the State of Texas was erroneous. Although the Foundation seemingly concedes that the Eleventh Amendment bars its assertion of this claim in federal court, it contends that the district court nonetheless should have remanded the claim to state court. Third, the Foundation maintains that the district court erred in reaching its motion for partial summary judgment. We address each of the Foundation's claims in turn.

A. Dismissal of the Foundation's § 1983 Claim against Mauro

The Foundation asserts that the district court erred in dismissing its § 1983 claim against Mauro for lack of subject matter jurisdiction due to the Eleventh Amendment bar. The Foundation asserts that in requesting declaratory and prospective injunctive relief against Mauro – who, acting under color of state law, allegedly deprived the Foundation of its property without due

process of law – its claim is not barred by the Eleventh Amendment.

In its amended complaint, the Foundation asserted:

> This is a suit against Garry Mauro in his official capacity as Commissioner of the General Land Office under 42 U.S.C. § 1983 and the Due Process clause of the Fourteenth Amendment to the United States Constitution and under state law, for declaratory and injunctive relief to determine boundary and title to certain real property. . . . Specifically, Defendant Mauro has been and is currently depriving the Foundation of its real property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

The Foundation further detailed its requested relief:

> The Foundation requests that this Court determine and declare that all of the Disputed Land is above the vertical elevation of mean higher high water of the Laguna Madre, that the eastern boundary of the disputed Land constitutes the eastern boundary of the Big Barreta and Little Barreta grants, and that the Foundation is the owner of the Disputed Land. Further, the Foundation requests that Defendant Mauro be permanently enjoined from exercising dominion and control over the Disputed Land and leasing any portion of the Disputed Land for oil and gas development or surface use, and be directed to amend all official "state lease tract" maps and other official maps and documents to depict the Disputed Land as privately-owned land and not as state-owned submerged land.

After evaluating the Foundation's claims against Mauro and the ultimate relief requested, the district court concluded that "the true nature of this action is a title dispute" between the Foundation and the State. We agree.

The Foundation emphasized in its complaint that its suit against Mauro was *to determine boundary and title to certain real property.* For relief, the Foundation clearly requested that the district court determine and declare that *the Foundation was the owner* of the disputed land. The Foundation also requested that Mauro be permanently enjoined from leasing any portion of it for mineral development or surface use and that Mauro be directed to amend all state lease tract maps and other official documents *to depict that the disputed land is "privately owned."*

We read this entreaty as one that the Foundation's claim to the disputed property be declared secured as against all the world and that Mauro, in his capacity as Land Commissioner, officially recognize this property as the Foundation's – in other words, that the district court adjudicate title to the property. However, a federal court does not have the power to adjudicate the State's interest in property without the State's consent. *See Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 682, 700, 102 S.Ct. 3304, 3313, 3322, 73 L.Ed.2d 1057 (1982) (plurality opinion); *id.* at 703, 102 S.Ct. at 3324 (White, J., concurring, joined by Powell, Rehnquist, and O'Connor, JJ.); *see also Tindal v. Wesley*, 167 U.S. 204, 223, 17 S.Ct. 770, 777-78, 42 L.Ed. 137 (1897); *United States v. Lee*, 106 U.S. (16 Otto) 196, 222, 1 S.Ct. 240, 262, 27 L.Ed. 171 (1892) (explaining that the United States could not be made a defendant to a suit concerning its property without its consent under the

doctrine of sovereign immunity). The State of Texas has not so consented.

We also recognize that a state official, such as Mauro, acting in his official capacity, is not a "person" under § 1983 unless the relief requested in a suit against him in this capacity is prospective relief. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 & n. 10, 109 S.Ct. 2304, 2312 & n. 10, 105 L.Ed.2d 45 (1989); *see Stem v. Ahearn*, 908 F.2d 1, 4 (5th Cir. 1990), *cert. denied*, 498 U.S. 1069, 111 S.Ct. 788, 112 L.Ed.2d 850 (1991); *see also Howlett v. Rose*, 496 U.S. 356, 365-66, 110 S.Ct. 2430, 2437, 110 L.Ed.2d 332 (1990) ("*Will* establishes that the State and the arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit [under § 1983] in either federal or state court."). To provide the Foundation with the relief it requests would necessitate a determination by the district court that the State does not have title to the disputed property, title which the State has claimed for the past century and which was effectively adjudicated in the State in *Humble Oil*. Accordingly, the relief the Foundation requests, although nominally against Mauro, is retroactive relief against the State. *See Toledo, Peoria & Western R.R. Co. v. State of Illinois, Dep't of Transp.*, 744 F.2d 1296, 1299 (7th Cir. 1984), *cert. denied*, 470 U.S. 1051, 105 S.Ct. 1751, 84 L.Ed.2d 815 (1985) (holding that the relief "requested by the plaintiff ordering the state to release its interest in real property" is similar to the "retroactive" relief barred by the Eleventh Amendment under *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), and not the "prospective" relief permitted by *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979)); *see also Pennhurst*, 465 U.S. at 101 n.

11, 104 S.Ct. at 908 n. 11 (" 'The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act." ' " (quoting *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963) (citations omitted)).

Based on the Foundation's specific request for relief in its complaint against Mauro in his official capacity, the district court had proper reason to dismiss the Foundation's § 1983 claim. *See Stem*, 908 F.2d at 4 (concluding that because under *Will* state officials sued in their official capacities for damages are not "persons" under § 1983, the court lacked subject matter jurisdiction over the plaintiff's claim against the defendants in their capacities as Texas state employees).

The Foundation, however, argues that despite the way it phrased its request for relief, its § 1983 claim was not brought to adjudicate title to the disputed property but for right to possession of that property as against Mauro. We point out that this case was removed to federal court in February 1990. However, it was not until October 21, 1991 – when the Foundation filed a post-submission brief on its § 1983 claim after a hearing on the parties' cross-motions for summary judgment – that the Foundation first suggested that the court should recognize that its § 1983 claim was for right to possession of

the disputed property as against Mauro.[2] The Foundation asserts the same on appeal. The Foundation's argument is thus that a federal court has jurisdiction to hear its suit for declaratory and injunctive relief against the government official *in possession* of its property, i.e., Mauro, who has "invaded and occupied" property rightfully belonging to the Foundation.

We need not decide whether in some sense Mauro is actually "in possession" of the disputed property as the Foundation contends because in order to grant the Foundation the right to possession of this property as against Mauro, the district court would have to determine that title rests in the Foundation and thus adjudicate the State's interest in the disputed property – property which the State has "owned" for the past century. As we have already made clear, a federal court is not empowered to adjudicate the State's interest in property without the State's consent. *See Treasure Salvors, Inc.*, 458 U.S. at 682, 700, 102 S.Ct. at 3313, 3322; *id.* at 703, 102 S.Ct. at 3324 (White, J., concurring, joined by Powell, Rehnquist, and O'Connor, JJ.).

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[2] We recognize that in its reply to Mauro's response to the Foundation's partial motion for summary judgment, filed on August 30, 1991, the Foundation stated that it had asserted a valid § 1983 cause of action because "it was well established that a suit for injunctive relief to obtain possession of property wrongfully held by state officials is not barred by the Eleventh Amendment," citing *Treasure Salvors* and *Tindal* for that proposition. However, it was not until the Foundation filed its post-submission brief on October 21, 1991, that the Foundation actually asserted that its requested relief was for possession of the disputed property as against Mauro.

We also note that the Foundation's reliance on the Supreme Court's decisions in *Lee*, *Tindal*, and *Treasure Salvors* is misplaced. First, the Foundation fails to recognize that *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949), explicitly overruled *Tindal*, *see Pennhurst*, 465 U.S. at 110 n. 19, 104 S.Ct. at 913 n. 19, and significantly limited *Lee*, *see Larson*, 337 U.S. at 696-97, 69 S.Ct. at 1464-65; *see also Treasure Salvors*, 458 U.S. at 688-89, 102 S.Ct. at 3316-17.

Second, *Treasure Salvors* speaks directly against the Foundation's argument. In *Treasure Salvors*, the Court addressed the issue of whether the district court's arrest warrant in an admiralty *in rem* action, issued against two state officials who held artifacts from an abandoned vessel found off the Florida Keys, was barred by the Eleventh Amendment. A plurality of the Court concluded that the warrant was not so barred. *Id.* at 699, 102 S.Ct. at 3322.

The plurality reached this conclusion by first explaining that the warrant had issued against state officials who were in possession of the artifacts and not the State of Florida itself. *Id.* at 691, 102 S.Ct. at 3318. The plurality next noted that although the officials claimed a state statute as authority to possess these artifacts, the statute permitted officials to hold artifacts which had been found on state-owned submerged land and the artifacts in question had been found in international waters. *Id.* at 695, 102 S.Ct. at 3320. Thus, the state officials were without a colorable claim to these artifacts. *Id.* at 696, 102 S.Ct. at

3320. Finally, the plurality explained that because the warrant sought possession of specific property and was not an *in personam* action brought to recover damages from the State, the warrant was permissible prospective relief. *Id.* at 699, 102 S.Ct. at 3322.

However, the plurality emphasized that the warrant itself merely secured possession of the artifacts and that its execution did not adjudicate the State's right to them. *Id.* at 697, 102 S.Ct. at 3321 (citing *Tindal*, 167 U.S. at 223, 17 S.Ct. at 777-78). The plurality also decided that although this court had properly determined that the Eleventh Amendment did not bar execution of the warrant to secure possession of the artifacts held by state officials we had improperly adjudicated the State's right to those artifacts in making such a determination. *Id.* 458 U.S. at 700, 102 S.Ct. at 3322. The Court then concluded that a federal court did not have the power to adjudicate the State's interest in the artifacts without the State's consent. *See id.*

The instant case is distinguishable from *Treasure Salvors* in that the defendant officials in *Treasure Salvors* had no colorable claim under which they were authorized by the State to hold these artifacts. On other hand, the State has "owned" the property at issue in the instant case for the past century, and title was effectively adjudicated in the State in *Humble Oil*. Moreover, the *Treasure Salvors* plurality determined that the warrant of arrest issued by the district court was permissible prospective relief because it sought only possession of the property from the defendant officials and was not an *in personam* action

to recover damages against the State. The relief the Foundation requests in the instant case, even if it is "possession" as against Mauro, can only be granted if the district court orders the State to relinquish its interest in the disputed property. Such relief would be the equivalent of recovering damages from the State.

Despite its contention that its § 1983 suit is only for declaratory and prospective injunctive relief against Mauro in his official capacity, the relief sought by the Foundation – no matter how its request for relief is phrased – would operate against the State. Hence, the State of Texas, not Mauro, is the real, substantial party in interest. We therefore conclude that the Foundation's § 1983 claim is barred by the Eleventh Amendment, and the district court did not err in determining that the court did not have the power to entertain the claim.

B. Disposition of the Fifth Amendment and § 1983 Claims

The Foundation also argues that the district court should have remanded its federal claims to state court. We disagree.

The district court properly concluded that it did not have subject matter jurisdiction over the Foundation's § 1983 claim. *See supra* Part III.A. The court also correctly determined that the Foundation's Fifth Amendment inverse condemnation claim brought directly against the State of Texas is also barred by the Eleventh Amendment. *See Alabama v. Pugh*, 438 U.S. 781, 782, 98 S.Ct. 3057, 3057-58, 57 L.Ed.2d 1114 (1978) (reaffirming the rule set forth in *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed.

842 (1890), that a citizen cannot sue a state in federal court, even if only prospective injunctive relief is being sought, without the state's consent).

The Foundation acknowledges on appeal that its state and federal claims were not "separate and independent" and that it had alleged only a "single underlying wrong" from these claims. It also recognizes that the Supreme Court's decision in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 353-55 & n. 11, 108 S.Ct. 614, 620-22 & n. 11, 98 L.Ed.2d 720 (1988), makes it clear that the remand provision of 28 U.S.C. § 1441(c) does not apply in such a situation. Yet, the Foundation invites this court to determine that § 1441(c) is applicable in the instant case because "it makes no sense for a district court to possess discretion to remand all claims if the state and federal claims are " 'separate and independent,' " i.e., under § 1441(c), "but to have no such discretion if the claims are related." The Foundation thus invites us to recognize a new remand authority available to the district court. We decline the invitation and determine that the district court did not err by dismissing the Foundation's federal claims.[3]

C. Denial of Summary Judgment

Finally, the Foundation contends that the district court erred in denying its motion for partial summary

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[3] We express no opinion on the applicability of 28 U.S.C. § 1447(c) to the instant case. The Foundation has not argued or briefed this issue on appeal, *see* Fed.R.App.P. 28(a)(5), and in fact has asserted that "no statute expressly says that the Foundation's federal claims may be returned to state court."

judgment after the court had concluded that it lacked subject matter jurisdiction. We agree.

"Unless a federal court possesses subject matter jurisdiction over a dispute, . . . any order it makes (other than an order of dismissal or remand) is void." *Shirley v. Maxicare Texas, Inc.*, 921 F.2d 565, 568 (5th Cir. 1991). Hence, that portion of the district court's judgment denying the Foundation's motion for partial summary judgment should be vacated.

IV. CONCLUSION

For the foregoing reasons, we conclude that the district court did not err in dismissing the Foundation's § 1983 claim against Mauro and its Fifth Amendment claim against the State of Texas. However, the district court erred in denying the Foundation's motion for partial summary judgment. We therefore AFFIRM the district court's judgment of dismissal and VACATE that portion of the district court's judgment denying the Foundation's motion for partial summary judgment. Costs shall be borne by the Foundation.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION	§	
v.	§	C.A. NO. C-90-36
GARRY MAURO, COMMISSIONER GENERAL LAND OFFICE, AND THE STATE OF TEXAS	§	

ORDER OF DISMISSAL

I.

There lies along the south Texas gulf coast, between Padre Island and the mainland, a long, slender, and shallow body of water known as the Laguna Madre. It opens to the north in Corpus Christi Bay and to the south in the Gulf of Mexico at Port Isabel, a distance of approximately 110 miles. On the Laguna's western shore, east and south of Sarita, Texas, is the Kenedy Ranch owned by the plaintiff, The John G. and Marie Stella Kenedy Memorial Foundation. The boundary between the land of the Foundation and that of the State of Texas is at issue, specifically a determination of the ownership to approximately 35,000 acres of mud flats (and at times and places submerged) lying along the western edge of the Laguna Madre and the eastern edge of the Kenedy Ranch.

Title is in dispute. The plaintiff claims its title to the disputed land from two original Spanish and Mexican land grants, La Bareta ("Big Barreta") and Las Motas de la

Barreta ("Little Barreta"). Relying on *Luttes v. Texas*, 159 Tex. 500, 324 S.W.2d 167 (1959), plaintiff's ultimate goal is the judicial establishment of the mean higher high tide line across these flats as the boundary between its private lands and the State's public property. Defendants Garry Mauro, Commissioner of the General Land Office, and the State of Texas also claim title to the disputed land, arguing that the land is regularly covered by the waters of the Laguna Madre and, as such, constitutes submerged land which belongs to the State. Mauro and the State also find some comfort in the language of *Luttes*. In addition, defendants vigorously rely on an earlier decision of the Southern District of Texas, Corpus Christi Division, and this Circuit, which uses as a boundary the mean high tide line. *Humble Oil & Refining Co. v. Sun Oil Co.*, 190 F.2d 191 (5th Cir. 1951) (affirming district court decision in relevant part). While it is the plaintiff's position that *Luttes* overrules *Humble v. Sun*, thus requiring a fresh look at the boundary issue, the State argues *Humble v. Sun's* facts, findings, and holding properly resolved the title issue even under a *Luttes* test.

The dispute is more than an academic desire to establish a boundary over mud flats. Plaintiff's complaint is that Mauro refuses to acknowledge plaintiff's claims and that he continues to lease the mud flats to oil and gas companies for exploration and production. Exploration has been undertaken and, for many years, production has been successfully established. Great wealth has been produced to the benefit of the State and a proportional loss to plaintiff. If the plaintiff can move its boundary to the east, then the plaintiff hopefully gains mineral wealth. If defendants can resist plaintiff's attempt to move the

established boundary and maintain the status quo, the State will continue to receive benefits derived from the production of oil and gas from the disputed land. Plaintiff does not seek a return from Texas of royalties or other monies received under these leases.

II.

On several occasions, plaintiff sought legislative consent to sue the State, but was always refused such consent. Consequently, plaintiff proceeded without consent and, on January 1, 1990, filed this suit in Texas state district court in Kenedy County against defendant Mauro in his official capacity as Commissioner of the General Land Office. Plaintiff complains that Mauro, acting under color of state law, has violated plaintiff's Fifth and Fourteenth Amendment rights under the United States Constitution, 42 U.S.C. § 1983, as well as other state law rights. Plaintiff wants this Court to declare Mauro's continued leasing of the property to producers of oil and gas as violative of its property rights and to obtain this Court's injunction that Mauro cease his leasing activities, change existing state maps, and prepare another public map properly showing a boundary line between their properties as found by the Court.

Defendants removed this lawsuit to this Court on the basis of federal question jurisdiction. On March 4, 1991, the plaintiff filed its first amended complaint asserting additional claims, including a claim against the State for deprivation of property without just compensation under the Fifth Amendment to the United States Constitution.

Defendants have moved for summary judgment, relying on the Eleventh Amendment[1] to bar this suit. U.S. Const. amend. XI. Defendants also rely on the affirmative defenses of res judicata, collateral estoppel, stare decisis, laches, and comity to maintain the boundary established in *Humble v. Sun*. Plaintiff has also moved for partial summary judgment, seeking a finding from this Court that the disputed land is located above the mean higher high tide line.

This Court conducted a hearing on the parties' cross-motions for summary judgment. At the hearing, the plaintiff conceded that, absent the Sate's consent to suit, *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900 (1984), bars this Court from adjudicating either the state law claim asserted against Commissioner Mauro or the state law takings claim against the State. The plaintiff also conceded that *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057 (1978) (per curiam), which bars suit against the state in its own name, prevents this Court from hearing the federal constitutional taking claim asserted against the State. *See also, Brennan v. Stewart*, 834 F.2d 1248, 1253 (5th Cir. 1988) (citing *Alabama v. Pugh* for continuing vitality of Eleventh Amendment bar to suits directly against a state).

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[1] The Eleventh Amendment reads as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State." The Amendment has been interpreted by the Supreme Court to bar suits in federal court by citizens of the defendant state. *Hans v. Louisiana*, 134 U.S. 1 (1890).

Accordingly, plaintiff's state court claim against defendant Mauro, alleging that Mauro's exercise of dominion and control over the disputed land constitutes a cloud on plaintiff's title to the land, is dismissed. Similarly, plaintiff's claims against the State of Texas, arising under state or federal law, are barred by the State's assertion of its Eleventh Amendment immunity and are therefore dismissed. The Court also denies plaintiff's motion of partial summary judgment, finding that *Humble v. Sun* satisfies the defendants' need to establish issues of fact as to the proper location of the boundary between the Kenedy Ranch and the State's public lands.

III.

Jurisdiction of this Court depends entirely on whether plaintiff's § 1983 claim can survive defendants' Eleventh Amendment immunity. Plaintiff argues that its action is not against the State but only against Mauro in his official capacity and, as such, is not barred by the Eleventh Amendment, based on the Supreme Court's holding in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908). Specifically, plaintiff complains that Mauro, acting under the color of state law, has deprived plaintiff of its property in violation of plaintiff's Fifth and Fourteenth Amendment rights, through the following actions or inactions of Mauro:

> 1. Mauro, who is conferred by state law with the responsibility for and control of state land, Tex. Nat. Res. Code Ann. §§ 31.051, 31.052, and 31.063 (Vernon 1978), possesses the authority to determine for the State the boundaries between privately-owned lands and state-

owned submerged lands. Plaintiff has provided updated surveys of the disputed land to Mauro, which surveys demonstrate that the disputed lands lie above the boundary defined by the Texas Supreme Court in *Luttes*; however, Mauro, acting under color of state law, refuses to recognize or identify the proper location of the boundary between plaintiff's property and the State-owned lands.

2. Mauro, despite the authority to do so, fails to conduct his own survey of the disputed land to refute plaintiff's data.

3. Mauro, acting under color of state law, continues to show the disputed land on official state maps as being submerged lease tracts that are available for lease from the State.

4. Under color of state law, Mauro continues to negotiate and execute oil and gas leases to the property for the benefit of the State despite plaintiff's claimed ownership in the land.

5. Mauro, acting under color of state law, has deprived and continues to deprive plaintiff of its property without due process by repeatedly opposing plaintiff's attempts to obtain legislative consent to sue the State.

Plaintiff's First Amended Complaint, D.E. #35, at 2-8. Plaintiff argues that its only recourse to protect its constitutional and statutory rights is to bring this § 1983 action against Mauro in his capacity as commissioner of the General Land Office. Through this action, plaintiff requests that this Court determine and declare that the disputed land is above the mean higher high water and, as such, that plaintiff is the owner of the disputed land.

Further, plaintiff requests that Mauro be permanently enjoined from exercising dominion and control over the disputed land and from leasing any portion of the disputed land for oil and gas development or surface use, and be directed to amend all official "state lease tract" maps and other official maps and documents to depict the disputed land as privately-owned land and not as state-owned submerged land. Finally, plaintiff seeks an award of attorney's fee pursuant to 42 U.S.C. § 1988.

In order to rule for plaintiff on its § 1983 claims, this Court would have to find that plaintiff's claims against Mauro are violations of federal law instead of violations of state law. For the reasons stated herein, the Court finds that the acts complained of by plaintiff do not establish violations under federal law but are in fact claims against Mauro as a state official to vindicate state-created rights. As the plaintiff's claims do not rise to the level of a federal constitutional claim, the Court finds that it does not have jurisdiction over this case and dismisses plaintiff's claims.

IV.

In evaluating plaintiff's claims against Mauro and the ultimate relief requested, that title to the property be declared in plaintiff's name, this Court holds that the true nature of this action is a title dispute. Plaintiff claims ownership to the disputed land through the original Big and Little Barretta land grants which identify the Laguna Madre as the eastern boundary of the grants. The plaintiff

argues that since this Court's holding in *Humble v. Sun*,[2] wherein title to portions of the disputed land was effectively adjudicated to the State,[3] there has been a change in both the physical characteristics of the disputed land and in the state law interpreting such physical boundaries by virtue of the Texas Supreme Court's holding in *Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167 (1959). The plaintiff has provided the affidavits of two expert surveyors who testify that the disputed land is not submerged but lies above any proper value of mean higher high tide. As such, the plaintiff argues that the disputed land, by accretion, belongs to the plaintiff under the original land grants.

Defendants have claimed title to the property for over the past century on grounds that the land is commonly submerged by the waters of the Laguna Madre and that submerged lands belong to the State of Texas. Further, defendants argue that the plaintiff's predecessors in interest previously challenged the State's right to lease the property in *Humble v. Sun*, and that this Court held that the State's lessees were the proper lessees of the property through the State's ownership of the disputed

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[2] *Sun Oil Co. v. Humble Oil & Refining Co.*, 88 F. Supp. 658 (S.D. Tex. 1950), *modified by* 190 F.2d 191 (5th Cir. 1951).

[3] The Fifth Circuit affirmed the district court's holding in relevant part, but reversed that part of the holding permitting the intervention of the State as a party; however, the Fifth Circuit held that the lessees of the State were properly on the land.

land. Finally, defendants refute that any substantial physical changes have occurred to the disputed land's boundary which would necessitate a redefining of the boundary under *Luttes*.

If this Court were to find that *Luttes* represents a change in the law and that accretion of land by alluvion or dereliction had occurred, thus moving the Kenedy Ranch boundary to the east, then the Court could also find that the State's claim to the land was no longer valid and that Mauro's continued leasing of the property constitutes a trespass and a taking. Unquestionably, the ultimate issue to be decided is dependent on state law. Mauro's actions, which form the basis of plaintiff's § 1983 claim, are discretionary actions of an elected official acting under a state statute not challenged as unconstitutional; as such, plaintiff fails to state a violation of federal law to overcome the Eleventh Amendment immunity. At best, it is an allegation of a tortious taking.

Plaintiff presents its § 1983 claim against Mauro as one against a state official for violation of federal law. The plaintiff relies on the Supreme Court holding in *Ex Parte Young*, which provides that a suit challenging the constitutionality of a state official's action is not one against the State and is, therefore, not barred by the Eleventh Amendment. *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908). In effect, in an attempt to create a constitutional violation, plaintiff is arguing that when a state official, acting under color of title, deprives an individual of an alleged property interest, the deprivation rises to that of a constitutional violation.

This Court cannot agree with such a conclusion as suggested by plaintiff in light of the Supreme Court's holding in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106, 104 S. Ct. 900, 911 (1984) *Pennhurst II*. In *Pennhurst II*, the Supreme Court addressed the issue of whether a federal district court, over the objection of a nonconsenting state, could hear a pendent state law claim wherein the complaining party alleged violations of state law by state officials. The Court concluded that a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when the relief sought and ordered has an impact directly on the state itself. *Pennhurst II*, 465 U.S. at 117, 104 S. Ct. 917 (1984). The Court cautioned that when a suit is brought only against state officials, a question arises as to whether that suit is a suit against the state itself. If the action is in fact one against the state, the Eleventh Amendment bars the suit against the state officials because the state is the real, substantial party in interest. The Court commented that the purposes of the *Ex Parte Young* exception to the Eleventh Amendment bar was limited to Fourteenth Amendment claims alleging violations of the "supreme law of the land," that is, federal law violations. The Court went on to comment that:

> A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that

> underlie the Eleventh Amendment. We conclude that *Young* and *Edelman* are inapplicable in a suit against state officials on the basis of state law.

Pennhurst II, 465 U.S. at 105-106, 104 S. Ct. at 910-911.

Plaintiff's argument, that Mauro's violations of state law creates a constitutional violation of plaintiff's rights, mirrors the reasoning of the dissenting opinion of Justice Stevens in *Pennhurst II*. Under that view, an allegation that official conduct is contrary to a state statute would suffice to override the state's protection from injunctive relief under the Eleventh Amendment because such conduct is *ultra vires* by exceeding the official's authority. The majority, however, countered this argument and suits such as this one by stating that Justice Stevens' opinion " . . . rests on fiction, is wrong on the law, ... " *Id.* Thus, a mere error of law by state officers acting in their official capacity will not suffice to override the sovereign immunity of the State where the relief requested is effectively against the State. *Pennhurst II*, 465 U.S. at 106-117, 104 S. Ct. at 911-917.

Plaintiff has not challenged as unconstitutional the state statute which authorizes Mauro, as commissioner of the General Land Office, to perform his duties as Commissioner, which include the leasing of property and defending title. In fact, the statute expressly authorizes Mauro to "execute and perform all acts and other things relating to public land of the state or rights of individuals in public land which is required by law." Tex. Nat. Res. Code Ann. § 31.051 (Vernon 1978). It is evident that Mauro is acting within his statutory authority and on reasonable reliance of the State's title to the disputed

land, unchallenged for years and when challenged, affirmed in *Humble v. Sun.*

In addition to *Ex Parte Young,* plaintiff relies on three additional Supreme Court cases, *Tindal v. Wesley,* 167 U.S. 204, 17 S. Ct. 770 (1897), *United States v. Lee,* 106 U.S. 196, 1 S. Ct. 2440 (1882), and a more recent case, *Florida Dept. of State v. Treasure Salvors, Inc.,* 458 U.S. 670, 102 S. Ct. 3304 (1982), to support its position that Mauro's actions constitute a violation of federal law. Each of these cases can be distinguished. In *Treasure Salvors,* the plaintiff brought an admiralty action in federal court against a Spanish galleon, which it had recovered from the waters off the Florida coast, seeking a declaration of title to the galleon and its contents. The United States intervened in the action claiming title to the galleon. Prior to this admiralty action, in an unrelated case, *United States v. Florida,* 420 U.S. 531, 95 S. Ct. 1162 (1975), title to the submerged lands where the galleon was found had been adjudicated to be in the United States. After finding title to the galleon and its contents to be in Treasure Salvors, Inc., the federal court issued a warrant of arrest to obtain custody and jurisdiction over artifacts from the galleon in the possession of Florida state officials. Florida filed a motion to quash the warrant, which motion was denied. The federal court then issued an order for Florida to show cause why the state officials should not deliver the artifacts into the federal court's custody. Florida responded, *inter alia,* that the Eleventh Amendment was a bar to the federal court's jurisdiction. The Supreme Court in its plurality opinion held that the Eleventh Amendment was no bar to the federal court's warrant because the Florida

officials had no "colorable basis on which to retain possession of the artifacts." 458 U.S. at 682, 102 S. Ct. at 3313. Thus, the Court found that, since the Supreme Court had already determined that Florida had no claim to the artifacts, the State of Florida had no authority to claim the right to continued possession of the artifacts.

Although *Treasure Salvors* is a plurality opinion, the plurality and concurring/dissenting opinions recognize that the issue of a colorable claim is relevant to a decision challenging the unconstitutionality of a discretionary act. In effect, to establish an *Ex Parte Young* exception to Eleventh Amendment immunity, a claimant must establish that a state official's actions are *ultra vires* or unconstitutional and not merely a tortious interference with a claimant's property rights. *Treasure Salvors,* 458 U.S. at 690, 102 S. Ct. at 3304. The State of Texas certainly has, at a minimum, a "colorable basis" for claiming title to the disputed land. This Court, as well as the Fifth Circuit, considered the State of Texas to be the owner of the disputed land in *Humble v. Sun*. As the trial court noted in that case, the Big and Little Barreta grants contained acreage in excess of that called for in the grants even when limited to the surveys or lines contended by Sun and the State of Texas. As such, plaintiff's predecessor was estopped to claim the portion of the disputed land adjacent to the Big Baretta because prior title holders of the Big Baretta had accepted the boundary delineated in the patent survey conducted in 1905-06. The maps of both the state and federal governments have depicted this area as the Laguna Madre and, hence, as state-owned submerged lands, for over a century. Any argument that the

State has no "colorable basis" for claiming title is without merit.

The other cases relied on by plaintiff, *Ex Parte Young* (official acting ultra vires because state statute held unconstitutional), *Tindal v. Wesley* (taking unconstitutional because plaintiff's right to land already determined by state court), *United States v. Lee* (taking unconstitutional as property determined to be plaintiff's under state law), and *Treasure Salvors* (official had no colorable title to property), do not assist plaintiff. Plaintiff has *not* obtained a judgment declaring it the owner of the disputed land as did the plaintiffs in *Tindal* and *Lee*, nor has plaintiff shown that Mauro is acting without any colorable claim to the property, as in *Ex Parte Young* and *Treasure Salvors*. Although the plaintiff has brought its § 1983 claim against Mauro as a state official, in actuality the suit is against the State itself. A suit against state officials that is in fact a suit against a state is barred by the Eleventh Amendment regardless of whether it seeks damages or injunctive relief. *Pennhurst II*, 465 U.S. at 102, 104 S. Ct. at 909.

Based on the foregoing, the Court finds that plaintiff has failed to demonstrate a violation of federal law. In effect, plaintiff's § 1983 claim is an action against a state official for violation of state law and the relief requested is against the State, not Mauro. As such, under the Supreme Court's holding in *Pennhurst II*, plaintiff cannot maintain its claim in this Court, as the Eleventh Amendment clearly bars such a claim.

The Court also notes that despite the State's refusal to consent to suit, plaintiff is not without other relief.

Plaintiff is not foreclosed from attempting to establish its title superior to that of the State in a state court suit by challenging the right of any third party entering under the authority of the state's claim of ownership.

Accordingly, this case is dismissed for lack of jurisdiction.

ORDERED this 30 day of Sept, 1992.

H.W. HEAD, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION	§	
v.	§	C.A. NO. C-90-36
GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, AND THE STATE OF TEXAS	§	

FINAL JUDGMENT

Final judgment is rendered dismissing plaintiff's case for lack of jurisdiction. Costs are awarded to defendants.

ORDERED this 30 day of Sept, 1992.

H.W. HEAD, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION	§	
	§	C.A. NO. C-90-36
v.	§	
GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, AND THE STATE OF TEXAS	§	

AMENDED FINAL JUDGMENT

The Final Judgment dated September 30, 1992 is withdrawn, and the following is the Judgment of the Court:

It is the Judgment of this Court that plaintiff's claims asserted against Commissioner Mauro and the State of Texas pursuant to 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments are barred by the Eleventh Amendment and are dismissed for lack of jurisdiction. The Court remands all other claims to the 105th Judicial District Court, Kenedy County, Texas for its decision. Costs are awarded to defendants.

ORDERED this 2 day of Oct, 1992.

H.W. HEAD, JR
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION	§	
v.	§	C.A. NO. C-90-36
GARRY MAURO, COMMISSIONER, GENERAL LAND OFFICE, AND THE STATE OF TEXAS	§	

ORDER MODIFYING ORDER OF DISMISSAL

On September 30, 1992, when this Court issued its Order of Dismissal, it overlooked the removed status of this litigation. Rather than dismiss for lack of jurisdiction all of plaintiff's federal and state causes of action against defendants Garry Mauro, Commissioner of the General Land Office, and the State of Texas, it is the better judgment and the intention of the Court to dismiss only those claims of plaintiff that are barred by the Eleventh Amendment of the United States Constitution. These are plaintiff's claims asserted against Commissioner Mauro and the State of Texas pursuant to 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments.

All other claims the Court remands to the 105th Judicial District Court, Kenedy County, Texas for its decision.

ORDERED this 2 day of Oct, 1992.

H.W. HEAD, JR
UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 27 1994
OFFICE OF THE CLERK

No. 94-574

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION,
Petitioner,

vs.

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, AND THE STATE OF TEXAS,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Eleventh Amendment bar a private party from bringing an action under 42 U.S.C. § 1983 against the state official charged with the control and management of state lands, when the purpose of the action is to determine title to lands held and claimed by the state?

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No. 94-574

IN THE
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THE JOHN G. AND MARIE STELLA
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vs.

GARRY MAURO, COMMISSIONER OF THE
GENERAL LAND OFFICE, AND
THE STATE OF TEXAS,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Garry Mauro, Commissioner of the General Land Office, and the State of Texas, by and through their attorney, the Attorney General of Texas, file this Brief in Opposition.

STATEMENT OF THE CASE

A. Course of proceedings and disposition below

The John G. & Marie Stella Kenedy Memorial Foundation ("Foundation") originally filed this action on January 9, 1990, in state court in Kenedy County, Texas,

seeking declaratory and injunctive relief against Garry Mauro in his capacity as Commissioner of the General Land Office ("Commissioner") on claims predicated on state common law as well as on 42 U.S.C. § 1983 and the due process clause of the Fourteenth Amendment to the United States Constitution. The Foundation sought an adjudication of title to lands held by the State ("disputed land"). The Foundation also asserted that the State of Texas ("State") had taken the Foundation's property for public use without adequate compensation under Article I, Section 17 of the Texas Constitution and claimed unspecified damages for preexisting oil and gas leases entered into by the State on the disputed land.

On February 12, 1990, the Commissioner and the State removed the action to the U.S. District Court in Corpus Christi, Texas, and raised affirmative defenses, including immunity from suit under the Eleventh Amendment. The Commissioner and the State filed a motion for summary judgment. Thereafter, the Foundation amended its complaint to assert a taking under the Fifth Amendment to the U.S. Constitution. The Foundation filed a motion for partial summary judgment, and the Commissioner and the State filed a supplemental summary judgment motion addressing, among other matters, the Foundation's Fifth Amendment claim. The district court considered all motions at a hearing on October 11, 1991.

On October 1, 1992, the district court entered an Order of Dismissal and a Final Judgment in which it dismissed the entire case for want of jurisdiction. The dismissal of the federal claims was based on a determination that they were barred by the Eleventh Amendment. The district court set out two independent reasons for dismissing the federal claims against the Commissioner: the Commissioner is sued solely in his official capacity for alleged erroneous applications of state law (Petitioner's Appendix at B9 - 12) and the relief sought against the Commissioner is effectively relief against the State and would cause a direct

impact on the State treasury by causing the loss of title to lands held by the State. (Petitioner's Appendix at B12 - 14.)

On October 2, 1992, the district court entered an Order Modifying Order of Dismissal, reaffirming its dismissal of the federal claims on Eleventh Amendment grounds but remanding the Foundation's state law claims to state court. On that same day, the district court entered an Amended Final Judgment consistent with its modified dismissal order and awarded costs to Defendants.

The Foundation appealed the dismissal of its § 1983 claim and its Fifth Amendment takings claim to the Fifth Circuit. The court of appeals held that the district court had erred in touching on the merits of the action by denying the Foundation's motion for partial summary judgment but otherwise affirmed the district court's dismissal of the Foundation's federal claims. The court of appeals based its affirmance of the dismissal of the Foundation's § 1983 claims against the Commissioner on the second ground articulated by the district court -- viz, that the action against the Commissioner was, in effect, an impermissible action to adjudicate the State's interest in property without the State's consent. (Petitioner's Appendix at pp. A9 - 11.) The court of appeals refused the Foundation's request that its Fifth Amendment takings claim be remanded to state court on the ground that the district court lacked statutory authority to remand the federal claim. (Petitioner's Appendix at pp. A15 - 16.)

B. Related state court proceedings

The Foundation correctly notes that, after the district court remanded its state law claims, the Foundation pursued its state law claims in the state court in Kenedy County. It also reasserted its federal claims, although jurisdiction over those matters rested exclusively in the federal courts. The state court sustained Respondents' pleas to the jurisdiction based on sovereign immunity and on the ground that the

federal claims were outside the state court's jurisdiction. The Foundation appealed the dismissal. On October 13, 1994, the parties presented oral argument in the state appellate court, and the court submitted the case for decision.

The Foundation also correctly notes that interpleader actions filed by oil and gas lessees are pending in state court in Travis County, Texas, and that the Foundation has cross-claimed against Respondents, seeking a boundary and title determination as to the disputed land. Respondents dispute the Foundation's assertion that its right to proceed in the Travis County forum is uncertain. (Petitioner's Brief at 8.) The Foundation and Respondents, along with the interpleading lessees, have consolidated the two cases and are moving them forward to final disposition. Respondents filed a motion for summary judgment in the state court proceeding on September 16, 1994. Respondents acknowledge therein that the Foundation has a right to bring a boundary action directly against the State in Travis County under section 33.171 of the Texas Natural Resources Code and assert on the merits that the State's continued ownership of the disputed land is established as a matter of law.

Respondents made these same assertions to the Fifth Circuit and, in fact, raised a ripeness argument in their post-submission brief filed with the court of appeals. The Foundation's suggestion that it may have no means to obtain a title and boundary determination is meritless.

C. The Foundation's misstatements as to state law

In its Statement of the Case, the Foundation presents, without citation to authority, its interpretation of Texas boundary law. The Foundation states broadly that "[f]ast land bordering the Laguna Madre belongs to littoral property owners." (Petitioner's Brief at 4.) While Respondents disagree with the Foundation's claim that the disputed land is fast land, were it so, title would not necessarily vest in the littoral property owners. Littoral property owners must also

establish that the fast land has accreted to their upland properties rather than to the bed of the sea, which is state owned. *Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167, 187 (1958), *opinion on remand*, 328 S.W.2d 920 (Tex. Civ. App.--Waco 1959, no writ). A littoral property owner could also establish title by proving that the water has withdrawn due to reliction, an unlikely theory along the Texas coast, where sea level has been rising for at least the last century. It is Respondents' position that the Foundation cannot establish the disputed land to be fast land and, further, cannot establish any right to the land under either the doctrine of accretion or the doctrine of reliction.

REASONS FOR DENYING THE WRIT

I. The question presented for review is not worthy of this Court's attention.

Rule 10.1 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The Foundation has not demonstrated a special or important reason in this case, and none exists. The issues in this case involve the application of established Eleventh Amendment principles. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction.

II. The Eleventh Amendment bars the Foundation's action against Respondents.

The Foundation's preliminary reason proffered for granting the writ in the case is a criticism of the district court's first ground for dismissal and a suggestion that the court of appeals' opinion is deficient for failing expressly to address the district court's reasoning. The basis for the Fifth Circuit's decision is apparent from the opinion. The court of appeals determined that the Foundation's action against the

Commissioner is barred because the Foundation seeks to adjudicate title against the State. The court of appeals neither adopted nor discussed the district court's reasoning that an action against a state official for an alleged erroneous application of state law fails to give rise to a federal claim. It is apparent from the Fifth Circuit's silence on that issue that the court of appeals' judgment was not based on that prong of the district court's decision.

The Fifth Circuit properly followed this Court's holdings and reasoning in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982); and *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). Those cases make clear that immunity protects against an action that is in reality against the State, even when a state officer is named.

The Foundation's argument that an adjudication of title against the Commissioner would not constitute an adjudication against the State is specious. The Foundation has coupled its action against the Commissioner with a takings action against the State. Clearly, it seeks to make a determination against the Commissioner binding against the State. A determination of title and boundary against the Commissioner, the state official charged with locating the boundary and determining State ownership, would necessarily be binding on the State. (*See* Petitioner's Appendix at A8 - 12.)

III. The Fifth Circuit's decision is consistent with this Court's decisions as well as those of other circuits.

The Foundation's struggle to create the appearance of a conflict with this Court's decisions as well as decisions of other circuits falls short. The Foundation asserts that the court of appeals erred in examining the Foundation's request for relief in determining that its action was, in effect, an

action for relief against the State. The assertion misstates what the Fifth Circuit did and ignores this Court's directives on Eleventh Amendment analysis. The Fifth Circuit examined the Foundation's entire pleading in reaching its conclusion that the Foundation sought a determination of title against the State. (Petitioner's Appendix at A7 - 9.) Moreover, this Court's relevant test involves analysis of the nature of the relief sought. *See Edelman v. Jordan*, 415 U.S. 651, 663-71 (1974) (setting out method for determining whether impermissible retroactive relief is sought). *Edelman* does not merely allow consideration of the relief sought -- it *requires* it.

The Foundation argues that federal courts must accept without analysis its contention that the fiction recognized in *Ex parte Young*, 209 U.S. 123 (1908), is properly employed in this case. This argument is contrary to this Court's ruling in *Edelman* and a host of other cases. *See, e.g., Papasan v. Allain*, 478 U.S. 265 (1986) (claim seeking to require state officials to provide trust income held barred by Eleventh Amendment); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945) (action against state officers to recover gross income tax paid held barred as an action against the state). The Fifth Circuit properly analyzed the relation between the *Ex parte Young* doctrine and the Eleventh Amendment bar. (Petitioner's Appendix at pp. A9 - 14.)

The Fifth Circuit also properly analyzed the narrow exception to Eleventh Amendment immunity carved by this Court in *Treasure Salvors*, 458 U.S. 670 (1982). The Fifth Circuit noted that the plurality recognized that the state officials in *Treasure Salvors* were holding the artifacts "without a colorable claim" to them. (Petitioner's Appendix at A13.) The Fifth Circuit then distinguished this case from *Treasure Salvors* by recognizing that "the State has 'owned' the property at issue in the instant case for the past century, and title was effectively adjudicated in the State in *Humble Oil*." (Petitioner's Appendix at A14.) The Fifth Circuit's

recognition of an exception to Eleventh Amendment immunity for officials holding property in which a state has no colorable claim of title is an appropriate interpretation of the *Treasure Salvors* decision.

The Foundation criticizes the court of appeals' analysis and argues that the reasoning in *Treasure Salvors* should be restricted to *in rem* actions. The reasoning in *Treasure Salvors* does not support such a restrictive interpretation. The cases on which the Foundation relies for its assertion of a conflict in the circuits undermine rather than support the Foundation's arguments. In *Zych v. Wrecked Vessel Believed to be the "Lady Elgin"*, 960 F.2d 665, 669 (7th Cir.), *cert. denied*, __ U.S. __, 113 S.Ct. 491 (1992), the Seventh Circuit expressly recognized that the "eleventh amendment applies to admiralty *in rem* proceedings," and held that the amendment barred an action to establish ownership of artifacts from a wrecked ship as against a state's claim to them. The court stated that "*Treasure Salvors* is nothing but an application of *Edelman*," and lent no credence to the Foundation's argument that *in rem* cases should be given different Eleventh Amendment analysis than direct actions against state officials. In *Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked and Abandoned Vessel*, 717 F.2d 6, 8 (1st Cir. 1983), the First Circuit similarly applied the Eleventh Amendment to bar an action to adjudicate ownership of a wrecked vessel claimed by the state.

The Fifth Circuit's characterization of the state claim herein as colorable is not in conflict with the *Zych* and *Maritime Underwater Surveys* decisions. The Fifth Circuit may give the *Treasure Salvors* "colorable claim" requirement a more generous interpretation than is given by the Seventh Circuit in *Zych*. This distinction, however, does not amount to a conflict among the circuits and weighs against a reversal of the Fifth Circuit's decision. It in no way supports the Foundation's request for relief from this Court. The court in *Zych* held that the strength of the state's legal position was

irrelevant and, if the state asserted ownership, that ownership could not be litigated in federal court. *Zych*, 960 F.2d at 670. In *Maritime Underwater Surveys*, the court distinguished *Treasure Salvors* on the ground that the state was not a party in *Treasure Salvors* and noted that the state's interest was directly at issue in the case before it. 717 F.2d at 8. In the instant case, the State is a party and it has asserted ownership to the disputed land. Under the analysis employed by the courts in *Zych* and *Maritime Underwater Surveys*, the Eleventh Amendment bar would apply without regard to whether the State's claim was colorable.

The Fifth Circuit's partial reliance on its decision in *Humble Oil & Ref. Co. v. Sun Oil Co.*, 190 F.2d 191 (5th Cir. 1951), *opinion on rehearing*, 191 F.2d 705 (5th Cir. 1951), *cert. denied*, 342 U.S. 920 (1952) ("*Sun v. Humble*"), for its determination that the State has a colorable claim to the disputed land was appropriate and affords no basis for the granting of this petition. The State disputes the Foundation's attack on that decision and would point out that the Supreme Court of Texas cited the decision with approval in *Luttes v. State*, 324 S.W.2d at 170, 186. The State also disputes the Foundation's claims that the facts and the law have changed since the Fifth Circuit's decision in *Sun v. Humble*. That dispute, however, does not present a question for review by this Court.

CONCLUSION

For the reasons stated, Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1994

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION,

Petitioner,

vs.

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, AND THE STATE OF TEXAS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE DUNN-McCAMPBELL ROYALTY INTEREST, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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No. 94-574

In The

Supreme Court of the United States

October Term, 1994

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION,

Petitioner,

vs.

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, AND THE STATE OF TEXAS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE DUNN-McCAMPBELL ROYALTY INTEREST, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Amicus curiae Dunn-McCampbell Royalty Interest, Inc. respectfully submits this Brief in support of the Petition for a writ of certiorari filed by Petitioner The John G. and Marie Stella Kenedy Memorial Foundation in the above-entitled proceeding.

INTEREST OF AMICUS CURIAE

Amicus curiae Dunn-McCampbell Royalty Interest, Inc. ("Dunn-McCampbell") is a property owner in a situation

similar to that of Petitioner The John G. and Marie Stella Kenedy Memorial Foundation (the "Foundation"). Dunn-McCampbell owns mineral interests underlying Padre Island, which lies between the Gulf of Mexico and the Laguna Madre in south Texas. Dunn McCampbell's property is on the side of the Laguna Madre opposite the roughly 35,000 acres of littoral property (the "Disputed Land") that is at issue in this case.

Dunn-McCampbell is deeply concerned that its own mineral interests may be expropriated, and that it will have no redress. Respondents the State of Texas (the "State") and Garry Mauro ("Mauro"), in his official capacity as Commissioner of the General Land Office, have recently taken the position that, because of changes in the shoreline, the State now owns minerals belonging to Dunn-McCampbell. According to Respondents, the land beneath which these minerals lie is no longer fast land, but rather part of the State's submerged property. For obvious reasons, Dunn-McCampbell has difficulty entering into leases with third parties for the extraction of oil and gas so long as the State claims ownership of Dunn-McCampbell's littoral property.

Under the Fifth Circuit's decision in this case, the State could, if it chose, deny Dunn-McCampbell any remedy in its own courts. Texas has no analogue to the Quiet Title Act, 28 U.S.C. § 2409a, or to the Tucker Act, 28 U.S.C. §§ 1346, 1491. The best alternative would be a claim against Mauro in his official capacity in the nature of an equitable quiet title action under 42 U.S.C. § 1983. According to the Court of Appeals, however, such an action would not lie if the State has any sort of colorable claim to the littoral property.

Although Dunn-McCampbell has no direct financial stake in the outcome of this lawsuit, its interests are closely aligned with those of the Foundation. Accordingly, Dunn-McCampbell vigorously supports the Foundation's Petition for a writ of certiorari.[1]

SUMMARY OF ARGUMENT

In its Petition, the Foundation has already established that the Fifth Circuit's decision conflicts with the jurisprudence of this Court and of other Circuits in several respects. The Foundation, however, did not discuss the absence of an obvious and adequate state law remedy for a deprivation of property as a critical factor in a due process analysis.

Texas law does not provide the Foundation with any clearly available theory or forum by which to present its claims to the Disputed Land. The gist of the Fifth Circuit's holding, then, was that a state sovereign may "declare itself the proprietor of all landed estates and the heir of all its subjects" with impunity. C. DE SECONDAT, BARON DE MONTESQUIEU, DE L'ESPRIT DES LOIS, livre V, chap. 14 (original 1748), *reprinted in* 2 OEUVRES COMPLÈTES DE MONTESQUIEU at 294-95 (R. Caillois ed. 1951) (discussing the absence of security of property in despotic states). According to the Fifth Circuit, a state

[1] Both the Foundation and Respondents have consented to the filing of this Brief. Letters from the respective attorneys for the Foundation and Respondents expressing this consent have been submitted to the Clerk of this Court.

may bar the doors of its own courthouses by invoking sovereign immunity, and no federal action for declaratory and injunctive relief against the official controlling a citizen's property will lie if the state has a "colorable claim" to the property. In so ruling, the Fifth Circuit rendered a deeply disturbing decision that is contrary to the holdings of this Court.

Moreover, the Fifth Circuit held that the State itself is the "real" party in interest under the Foundation's § 1983 action. This means not only that federal courts lack jurisdiction, but also that the Foundation has failed to state a viable cause of action, because the State is not a "person" for purposes of 42 U.S.C. § 1983.

In reaching this conclusion, the Fifth Circuit stressed that the State has a "colorable claim" to the Disputed Land. The Foundation has pointed out that the "colorable claim" test was designed to assay whether a federal court may exercise *in rem* jurisdiction over property allegedly belonging to a state and in the possession of a state officer, not to determine whether a federal court may enter an *in personam* decree against the officer affecting the disposition of the property. This consideration, however, deserves greater elaboration.

There are many instances where basic principles of federalism and multiple sovereignty prevent a federal (or a state) court from exercising *in rem* jurisdiction. Nonetheless, a court that lacks *in rem* jurisdiction may still enter an *in personam* decree adjudicating rights in the *res*. By believing that the Foundation's § 1983 claim was – or even could be – an *in rem* action, and by analyzing the claim accordingly, the Fifth Circuit rendered a decision

that has a specious plausibility, and yet that is contrary to the most fundamental ideas of property rights and of federalism that this Court has espoused.

For these reasons, a writ of certiorari should issue, and this Court should review the decision of the Court of Appeals.

ARGUMENT IN SUPPORT OF GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I. In holding that a private property owner may be denied any federal theory of liability or any federal forum by which to vindicate its constitutionally protected property rights against a state official who is wrongfully occupying the property under the state's claim of right, even though the private owner may have no state law theory or state forum by which to seek redress, the Fifth Circuit's ruling conflicts with decisions by this Court and by other Circuits.

For years, the Foundation has been seeking a forum and a legal theory by which to vindicate its claims to the Disputed Land. Respondents, however, have repeatedly invoked sovereign immunity in Texas courts and the Eleventh Amendment in federal courts in order to deny the Foundation any redress.

From the outset, Respondents argued that unless the Texas Legislature granted the Foundation permission to sue, the Foundation was not entitled to present its claims anywhere on any basis. (Appendix at pp. A-4-A-5, B-2-B-4). After the United States District Court for the Southern District of Texas had remanded the Foundation's state

law claims to the state court in Kenedy County, Respondents secured the dismissal of those claims on sovereign immunity grounds. (Appendix at pp. C-1-C-6, D-1). The Foundation has appealed that dismissal.

It was only well after the Foundation had appealed the dismissal of its action under 42 U.S.C. § 1983 to the Fifth Circuit that Respondents suggested *for the first time* that the Foundation could bring an action for declaratory relief against the State under Tex. Nat. Res. Code § 33.171 (Vernon 1993). (Appendix at pp. C-5-C-6, F-3-F-9). Revenues from submerged lands owned by the State of Texas are controlled by the School Land Board (the "Board"). Mauro, in his official capacity, chairs the Board. Tex. Nat. Res. Code § 33.171 permits a littoral landowner who has been adversely affected by the Board's actions to bring a declaratory judgment action against the State in a court in Travis County.

Not one reported case has been decided under this statute, even though it was enacted in 1973. Moreover, under Texas law, sovereign immunity is jurisdictional; Texas courts are required to examine their subject matter jurisdiction *sua sponte;* and statutory waivers of sovereign immunity are strictly construed. *See, e.g., Duhart v. State,* 610 S.W.2d 740, 742 (Tex. 1980); *Magnolia Petroleum Co. v. Walker,* 125 Tex. 430, 441, 83 S.W.2d 929, 934 (1935), *cert. denied,* 296 U.S. 623, 56 S. Ct. 144, 80 L. Ed. 442 (1935). It is not certain that the Board has taken any "action" within the meaning of Tex. Nat. Res. Code § 33.171 so as to permit a claim to be asserted under that statute.

Finally, while the Foundation's appeal was pending before the Fifth Circuit, several of the State's oil and gas lessees whose leaseholds included portions of the Disputed Land commenced an interpleader action in a state court in Travis County, naming the Foundation and Respondents as defendants. (Appendix at pp. G-1-G-13, H-1-H-9). The Foundation has cross-claimed against the State, reasserting its rights in the Disputed Land. (Appendix at pp. I-4-I-12). The State has not filed an answer to the cross-claim. It is uncertain whether the Foundation may be faced with yet another sovereign immunity bar. *See Department of Public Safety of Texas v. Great Southwest Warehouses, Inc.*, 352 S.W.2d 493, 494-95 (Tex. Civ. App. – Austin 1961, writ ref'd n.r.e.) (State of Texas may be sued only with its consent, and this can be given only by the Legislature; Attorney General has no authority to waive the State's sovereign immunity).

Respondents' refusal to allow the Foundation a forum stands in marked contrast to the State's use of changes in littoral boundaries to expand its own property. The Attorney General of Texas has argued successfully that shoreline boundaries are subject to relitigation because they are inherently subject to change. *Matcha v. Mattox*, 711 S.W.2d 95, 99-100 (Tex. App. – Austin 1986, writ ref'd n.r.e.), *cert. denied*, 481 U.S. 1084, 107 S. Ct. 1911, 95 L. Ed. 2d 517 (1987). When a shoreline has eroded or water levels have risen, the State has been quick to reap the benefit by resorting to its courts to secure the new additions to its submerged property. *City of Corpus Christi v. Davis*, 622 S.W.2d 640, 644-46 (Tex. Civ. App. – Austin 1981, writ ref'd n.r.e.); *see City of Port Isabel v. Missouri Pac. R. Co.*, 729 S.W.2d 939, 942-44 (Tex. App. –

Corpus Christi 1987, writ ref'd n.r.e.). When there is substantial evidence that the fast land has expanded, however, and that the State's submerged property has diminished accordingly, Respondents refuse to allow a littoral owner even to present its claims.

The Fifth Circuit was aware of the uncertainty as to whether any Texas forum or state law theory could be used to adjudicate the Foundation's rights. The Court of Appeals requested post-submission briefing on this issue. (Appendix at pp. E-3-E-9, F-2-F-9). Nonetheless, the Fifth Circuit affirmed the dismissal with prejudice of the Foundation's § 1983 claim.

This Court has long held that a state and its officers may not use a combination of state law sovereign immunity and the Eleventh Amendment to bar the doors of every courthouse. *General Oil Co. v. Crain*, 209 U.S. 211, 226-27, 28 S. Ct. 475, 480, 58 L. Ed. 754 (1908). Although the specific holding in *General Oil* was that a state could not close its own courts to federal claims for declaratory and injunctive relief against state officers, at a deeper level this Court was concerned with despotism. Federally guaranteed rights – including property rights – must have some forum for vindication. *Id.*, 209 U.S. at 226-27, 28 S. Ct. at 480. A state and its officials may not obscure the uncertainty of state law redress and at the same time stand on the Eleventh Amendment. *See Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 697, 102 S. Ct. 3304, 3321, 73 L. Ed. 2d 1057 (1982).

Conversely, this Court has held that if a sovereign does provide a clearly established procedure for relief when its officials retain private property under color of

the sovereign's claim of right, then the private owner has not necessarily been deprived of due process. In such a case, an action for prospective declaratory and injunctive relief against an official would not be essential to stave off despotism. *Larson v. Domestic & Foreign Service Corp.*, 337 U.S. 682, 696-98, 69 S. Ct. 1457, 1464-66, 93 L. Ed. 1628 (1949); *accord Malone v. Bowdoin*, 369 U.S. 643, 647-48, 82 S. Ct. 980, 983-84, 8 L. Ed. 2d 168 (1962).

Other Circuits have also considered the obvious availability of a state forum and remedy to be of critical importance. In *Toledo, Peoria & Western R. Co. v. State of Illinois, Dept. of Transp.*, 744 F.2d 1296 (7th Cir. 1984), *cert. denied*, 470 U.S. 1051, 105 S. Ct. 1751, 84 L. Ed. 2d 815 (1985) (upon which the Fifth Circuit purported to rely), the Seventh Circuit was deeply impressed that the State of Illinois provided a specialized body of law, and even a specialized tribunal – the Illinois Court of Claims – to redress any state deprivation of private property. *Id.* at 1299; *see id.* at 1297. Consequently, the court held that the claimant railroad had not been deprived of its property without due process, and that an action against state officials under § 1983 would not lie. *Id.* at 1299.

Here, by contrast, there is no certainty that any state tribunal or state law theory is open to the Foundation. Respondents have fought vigorously – and, thus far, successfully – to close the door of every courthouse to the Foundation. It was precisely this situation that a § 1983 action under the principles of *Ex parte Young*, 209 U.S. 123, 158-60, 28 S. Ct. 441, 453-54, 52 L. Ed. 714 (1908), and *United States v. Lee*, 106 U.S. (16 Otto) 196, 208-09, 1 S. Ct.

240, 250-51, 27 L. Ed. 141 (1882), was meant to redress. *See Malone*, 369 U.S. at 647-48, 82 S. Ct. at 983-84.[2]

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[2] The very reason that actions against *federal* officials under the principles of *United States v. Lee*, 106 U.S. (16 Otto) 196, 208-09, 1 S. Ct. 240, 250-51, 27 L. Ed. 141 (1882) are scarcely ever seen, is that federal law provides a claimant with an obvious and ready remedy. A citizen who believes that the federal government has expropriated his or her property may bring an action for just compensation under the Tucker Act, 28 U.S.C. §§ 1346, 1491. So long as a Tucker Act remedy is available, the claimant has not necessarily been deprived of due process, and any allegation that the claimant has been denied just compensation is unripe. *Larson v. Domestic & Foreign Service Corp.*, 337 U.S. 682, 696-705, 697 n.18, 69 S. Ct. 1457, 1464-69, 1465 n.18, 93 L. Ed. 1628 (1949); *accord Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016, 104 S. Ct. 2862, 2880, 81 L. Ed. 2d 815 (1984); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1550, 1551-52 (D.C. Cir. 1984) (en banc) (Scalia, J., dissenting), *vacated on other grounds*, 471 U.S. 1113, 105 S. Ct. 2353, 86 L. Ed. 2d 255 (1985).

The Tucker Act waives the sovereign immunity of the United States only for purposes of money damages or just compensation, not for equitable relief. *See United States v. Testan*, 424 U.S. 392, 397-98, 96 S. Ct. 948, 952-53, 47 L. Ed. 2d 114 (1976); *United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993). In a case such as the present one, if *federal* officers were occupying the Disputed Land, the Foundation might seek to establish its title against the United States directly, and thus establish its right to possession, under the Quiet Title Act, 28 U.S.C § 2409a. Once again, an action against federal officials for declaratory and injunctive relief might be superfluous.

In this case, however, Texas law simply has no analogue either to the Tucker Act or the Quiet Title Act. Texas is thus unlike many other states, such as Illinois, that provide their own counterparts to these federal statutes. *Cf. Toledo, Peoria & Western R. Co. v. State of Illinois, Dept. of Transp.*, 744 F.2d 1296, 1297, 1299 (7th Cir. 1984), *cert. denied*, 470 U.S. 1051, 105 S. Ct. 1751, 84 L. Ed. 2d 815 (1985). Consequently, an action for declaratory and injunctive relief against Mauro is essential to safeguard the most

Even if there were an adequate state law remedy, this should not affect the viability of the Foundation's § 1983 claim. An exhaustion of state procedures is not a prerequisite to bringing an action under § 1983. *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 500-01, 102 S. Ct. 2557, 2559-60, 73 L. Ed. 2d 172 (1982). Moreover, the provision of a state law remedy is truly relevant to a due process analysis only where the deprivation results from an official's random and unauthorized acts. Where, as here, a high state officer is carrying out considered state policy in depriving the claimant of a constitutionally protected right, a § 1983 action will lie, irrespective of the availability of any parallel state law cause of action. *Zinermon v. Burch*, 494 U.S. 113, 128-30, 138-39, 110 S. Ct. 975, 985, 990, 108 L. Ed. 2d 100 (1990); *accord, e.g., Keniston v. Roberts*, 717 F.2d 1295, 1301 (9th Cir. 1983).

The Fifth Circuit's decision, then, is contrary to the principles that this Court expounded in *General Oil Co. v. Crain* and that other Circuits have followed. A federal remedy must exist for the violation of a federal right. Otherwise, as this Court has long held, the door is open to arbitrary and despotic government. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803); *accord United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993) ("Judicial review is a fundamental safeguard against government agencies and public officials who wrongfully seize or hold a citizen's property."). By turning its back on this principle, the Fifth Circuit reached a decision that

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fundamental rights, which the State could otherwise flout with impunity. *See Woodall*, 12 F.3d at 793; *Ramirez de Arellano*, 745 F.2d at 1522-24 (majority opinion).

conflicts with the holdings of this Court and of other Circuits.

II. By ruling that a private landowner is barred from bringing an action for prospective declaratory and injunctive relief under 42 U.S.C. § 1983 against a state official who is occupying the landowner's property under color of the state's claim of right, the Fifth Circuit misapplied principles governing *in rem* actions to an equitable *in personam* action, and thereby rendered a decision that conflicts with the holdings of this Court and of other Circuits.

The Foundation seeks an adjudication of its title to the Disputed Land under its § 1983 action against Mauro. From this, the Fifth Circuit concluded that the Foundation's claim is for an adjudication of its title *as against the whole world. The John G. & Marie Stella Kenedy Mem. Found. v. Mauro*, 21 F.3d 667, 671 (5th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3296 (Sept. 27, 1994). This sort of relief may be obtained *only* in an *in rem* action. *Cadorette v. United States*, 988 F.2d 215, 223 (1st Cir. 1993) (per Breyer, C.J.); *accord Rounds v. Cloverport Foundry & Mach. Co.*, 237 U.S. 303, 306, 35 S. Ct. 596, 597, 59 L. Ed. 966 (1915). In an *in rem* action, the *res* itself is before the court as a party defendant; indeed, the court's jurisdiction and its power to adjudicate title as against the whole world depend on the presence of the *res* within the territorial limits of the court's authority. *United States v. One Lear Jet Aircraft*, 836 F.2d 1571, 1573 (11th Cir. 1988), *reh'g denied*, 842 F.2d 339 (11th Cir. 1988), *cert. denied*, 487 U.S. 1204, 108 S. Ct. 2844, 101 L. Ed. 2d 881 (1988); *accord Pennington v. Fourth Nat'l*

Bank of Cincinnati, Ohio, 243 U.S. 269, 271-72, 37 S. Ct. 282, 283, 61 L. Ed. 713 (1917).

It is surprising that the Fifth Circuit would have characterized the Foundation's claim for declaratory and equitable relief in *in rem* terms. It is difficult to imagine that a *res* could be a "person" within the meaning of § 1983, or that a *res* could violate a party's federally guaranteed rights. The very few lower courts that have even had occasion to consider the matter have all held that § 1983 actions against state officials are necessarily *in personam*. *Dubuc v. Green Oak Tp.*, 810 F. Supp. 867, 870 (E.D. Mich. 1992); *Jordan Patterson Post v. Chaffee*, 103 F.R.D. 523, 524-25 (D. Kan. 1984); *Gilbert v. School Dist. No. 50, Adams Cty.*, 485 F. Supp. 505, 507 (D. Colo. 1980).

The Foundation seeks prospective injunctive relief against Mauro. Equity acts only *in personam* and never *in rem*, even when rights to property are at issue. *Massie v. Watts*, 10 U.S. (6 Cranch) 148, 158-60, 3 L. Ed. 141 (1810) (per Marshall, C.J.); *accord LaVarre v. Hall*, 42 F.2d 65, 67 (5th Cir. 1930). The Foundation's claim is in the nature of an equitable quiet title action. Unlike a true *in rem* proceeding, a quiet title adjudication is binding only on the parties and their privies; it does not purport to establish title as against the whole world. *Cadorette*, 988 F.2d at 223 (per Breyer, C.J.); *accord Nevada v. United States*, 463 U.S. 110, 143-44, 103 S. Ct. 2906, 2924-25, 77 L. Ed. 2d 509 (1983).

Under the fiction of *Ex parte Young*, 209 U.S. at 158-60, 28 S. Ct. at 453-54, the State itself would not be a party to the Foundation's § 1983 action against Mauro,

and neither would the State be in privity with Mauro. Accordingly, the State would not be bound by an adjudication that the Foundation holds title to the Disputed Land. The action would be purely *in personam* and not *in rem*. *See United States v. Contents of Accounts No. 3034504504 & 144-07143*, 971 F.2d 974, 984 (3d Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1580, 123 L. Ed. 2d 148 (1993).

Having confused the very nature of the Foundation's § 1983 claim, the Fifth Circuit proceeded to employ a test drawn from the plurality opinion in *Treasure Salvors* that is applicable only to *in rem* proceedings. A central question in *Treasure Salvors* was whether a federal court could exercise *in rem* admiralty jurisdiction over property held by state officials under color of the state's claim of ownership. A federal court's assumption of *in rem* jurisdiction over assets legitimately under the control of a state agency is equivalent to expropriating state property. The very exercise of such jurisdiction amounts to an action against the state itself. *In re New York (II)*, 256 U.S. 503, 510-11, 41 S. Ct. 592, 593, 65 L. Ed. 1063 (1921). The *Treasure Salvors* plurality determined, however, that the state officials had no colorable claim to control the property under any pretext of the state's title, and hence that the district court had properly arrested the property in order to establish its *in rem* jurisdiction. *Treasure Salvors*, 458 U.S. at 694, 696, 699-700, 102 S. Ct. at 3319, 3320, 3322.

From this, the Fifth Circuit concluded that, because the State has a colorable claim to the Disputed Land, and because Mauro is authorized to control the State's submerged property, any action adjudicating title as against Mauro would be an action against the State itself. *Kenedy*

Mem. Found., 21 F.3d at 671-72. This application to an *in personam* action of a test designed to assay the validity of an *in rem* arrest warrant is contrary to the jurisprudence of this Court and of other Circuits.

For example, a federal court may not exercise *in rem* jurisdiction over any property that is already under the *in rem* jurisdiction of a state court, *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229-32, 43 S. Ct. 79, 81-82, 67 L. Ed. 226 (1922), even though parallel *in personam* actions over the same subject matter may proceed simultaneously in federal and state courts. *Donovan v. City of Dallas*, 377 U.S. 408, 412, 84 S. Ct. 1579, 1582, 12 L. Ed. 2d 409 (1964). This is because a court's seizure of property under the control of an instrumentality of another sovereign is necessarily an affront to the bedrock federalism principle of concurrent sovereignty. *See Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466-67, 59 S. Ct. 275, 280-81, 83 L. Ed. 285 (1939).

In this connection, however, a federal court could entertain an *in personam* action to cancel a deed or to quiet title even if a similar action were pending in a state court, or indeed if the disputed property were under the *in rem* jurisdiction of a state court. *Miller v. Miller*, 423 F.2d 145, 147 (10th Cir. 1970). Certainly a § 1983 action, which is *in personam*, may be brought in a federal court, even if the *res* at issue is under the control of a state tribunal. *Dubuc*, 810 F. Supp. at 870. An exercise of *in*

personam jurisdiction over a state official is not tantamount to taking property from a state instrumentality *pendente lite* or making the state itself a party.[3]

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[3] The interplay between concurrent or multiple sovereignty and the *in rem/in personam* dichotomy is evident in the relations among courts in different states as well as between federal and state courts. A court in state A may not assume *in rem* jurisdiction over property located in state B and enter a judgment directly affecting title. The *res* is not within the jurisdiction of state A, and any such judgment would violate the sovereignty of state B. *E.g., In re Estate of Reed*, 233 Kan. 531, 538-39, 664 P.2d 824, 830-31 (1983), *appeal dismissed & cert. denied*, 464 U.S. 978, 104 S. Ct. 417, 78 L. Ed. 2d 354 (1983); *Worcester North Sav. Ass'n v. Sommerville Milling Co.*, 101 N.H. 307, 308-09, 141 A.2d 885, 886 (1958), *appeal dismissed & cert. denied*, 358 U.S. 278, 79 S. Ct. 313, 3 L. Ed. 2d 298 (1959); *Deaton v. Vise*, 186 Tenn. 364, 376, 210 S.W.2d 665, 670 (1948). On the other hand, a court in state A may enter an equitable *in personam* decree ordering a party to transfer (or not to transfer) property located in state B. Such a decree is not *in rem* and in no way violates the sovereignty of state B. *Massie v. Watts*, 10 U.S. (6 Cranch) 148, 158-60, 3 L. Ed. 181 (1810); *Smith v. Mitchell*, 394 S.W.2d 308, 309-10 (Mo. 1965); *Donaldson v. Greenwood*, 40 Wash. 2d 238, 250-51, 242 P.2d 1038, 1045-46 (1952).

Similarly, neither a state nor a federal court has any jurisdiction or right to violate the sovereignty of a foreign nation by entering an *in rem* judgment purporting to adjudicate title to property located in that nation as against the whole world. Nonetheless, a state or federal court may enter an *in personam* order directing a party before the court how to dispose (or not to dispose) of his or her interest in property located in another country. *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1364 (9th Cir. 1988), *cert. denied*, 490 U.S. 1035, 109 S. Ct. 1933, 104 L. Ed. 2d 404 (1989); *Matarese v. Calise*, 111 R.I. 551, 562, 305 A.2d 112, 118-19 (1973).

Just so, a federal court may not exercise *in rem* jurisdiction over property controlled by a state official under the state's

Similarly, federal courts have no jurisdiction to entertain an *in rem* probate proceeding. *Sutton v. English*, 246 U.S. 199, 205, 38 S. Ct. 254, 256, 62 L. Ed. 664 (1918); *In re Broderick's Will*, 88 U.S. (21 Wall.) 503, 509, 22 L. Ed. 599 (1874). By the same token, a federal court may not assume *in rem* jurisdiction over any property that is part of a probate estate. This would amount to a violation of the state's sovereignty by seizing property under the control of a state instrumentality. *Lamberg v. Callahan*, 455 F.2d 1213, 1216 (2d Cir. 1972). Nonetheless, a federal court may enter an *in personam* judgment against an executor or administrator in his or her capacity as the personal representative of an estate, and the judgment may have an enormous effect on the distribution of the probate *res*. *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 43-44, 30 S. Ct. 10, 12, 54 L. Ed. 80 (1909); *Lamberg*, 455 F.2d at 1216.

On the same principle, when assets are under the administration of a state official, such as a banking or insurance commissioner acting as a liquidator or receiver, a federal court may not exercise *in rem* jurisdiction over that property. To do so would, in effect, amount to haling the state itself before the federal tribunal. On the other hand, a federal court certainly may enter an *in personam* decree against the official, and the decree may have a great impact on the disposition of the *res*. *Vacuum Oil Co.*

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colorable claim of right. Nevertheless, a federal court may enter an equitable *in personam* decree against that official concerning the disposition of the disputed property. The Fifth Circuit never understood these elementary principles involving different types of jurisdiction and the rights of different sovereigns.

v. Land Title Guar. & Trust Co., 80 F.2d 476, 477-78 (6th Cir. 1935).

Here, by applying the colorable claim test expounded in *Treasure Salvors*, the Fifth Circuit established conclusively that a federal court may not exercise *in rem* jurisdiction over the Disputed Land. This has no more relevance to the Foundation's § 1983 action, however, than does the double nexus test, the fellow servant doctrine, or the Rule in Mountjoy's Case. The teachings of this Court and the holdings of other Circuits show that, no matter how colorable a state's claim to property may be, an *in personam* action in the nature of an equitable proceeding to quiet title is well laid under 42 U.S.C. § 1983 against the state-appointed official who administers the *res*. The Fifth Circuit set itself in conflict with these holdings by confusing *in rem* and *in personam* actions. In no sense can the § 1983 action against Mauro be viewed as equivalent to an action against the State.

CONCLUSION

The Fifth Circuit's holding stands for the proposition that if a state has any non-frivolous claim to property, then a private party with a strong claim to ownership of that property may be denied every avenue for relief. According to the Fifth Circuit, the state could bar any state law action by invoking sovereign immunity, and a § 1983 action against a state official would not lie because the state itself would be the "real" party in interest if it had a colorable claim to the *res*. This holding could easily misguide lower federal courts and state courts as well. It

runs counter to decisions by this Court and by other Circuits and opens the door to despotism. Therefore, a writ of certiorari should issue to review the ruling of the Court of Appeals.

Respectfully submitted,

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Filed February 16, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION, Plaintiff,	§	
VS.	§	CIVIL ACTION NO. C-90-36
GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, and THE STATE OF TEXAS, Defendants.	§	

STATE OF TEXAS' MOTION FOR SUMMARY JUDGMENT AND SUPPORTING BRIEF

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* * *

ARGUMENT AND AUTHORITIES

* * *

C. Plaintiff's state-law theories of recovery against Commissioner Mauro are barred by sovereign immunity.

In an attempt to avoid the bar of sovereign immunity, Plaintiff seeks in its state-law claims against commissioner Mauro to acquire title to the Disputed Land on the theory that the commissioner's assertion of state ownership constitutes a cloud on Plaintiff's title. Plaintiff seeks against the Commissioner a declaratory judgment that the eastern boundary of its upland grants is the Intracoastal Waterway. Plaintiff relies on *State v. Lain*, 162 Tex. 549, 349 S.W.2d 579 (1961), as authority to maintain this action against the Commissioner.[46] Such reliance is misplaced.

State v. Lain was a suit to recover possession, not to acquire title, to property. Three factors critical to the Court's holding in *State v. Lain* distinguish that case from the case at bar: 1) the State was not a party to the litigation, 2) the State expressly disclaimed any title to the property at issue, and 3) the plaintiffs held record title to the land in dispute. As evidenced by the pleadings filed by Plaintiff itself in the present case, each of these critical factors is missing here. The State is a party. More importantly, the State claims, and has always claimed, title to the Disputed Land. Finally, Plaintiff does not have record title to the Disputed Land. As shown in *Sun v. Humble*, record title to the Laguna Madre, including the Disputed Land, has been in the State of Texas since 1845 and was in

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[46] Ex. A, p. 9, ¶ 16.

the Republic from 1836-45. 191 F.2d at 716. The eastern boundaries of the Big and Little Barretas were fixed in *Sun v. Humble* so that they "at no place conflict with the west lines of the state sections in Laguna Madre, as located by the State and delineated on a map in the General Land office." *Id.* ***Commissioner Mauro's plea to the jurisdiction with respect to the state-law claims asserted against him should be sustained. The Commissioner claims ownership of the Disputed Land only as the representative of the sovereign. Plaintiff's attempt to adjudicate the State's title to the property, even though brought against a state officer, is a suit against the State and, as Plaintiff concedes in its original Petition, Plaintiff has failed to obtain legislative authority to sue the State. Absent such authority, Plaintiff's claims are barred by sovereign immunity.*** *See State v. Isbell,* 127 Tex. 399, 94 S.W.2d 423 (Tex. Comm'n App. 1936, opinion adopted); *Bagg v. University of Texas Medical Branch at Galveston,* 726 S.W.2d 582, 584-86 (Tex. App. – Houston [14th Dist.] 1987, writ ref'd n.r.e.).

* * *

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* Emphasis added for purposes of this Appendix.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

KENEDY MEMORIAL FOUNDATION,	)	CIVIL ACTION
PLAINTIFF,	)	CA-C-90-36
VS.	)	CORPUS CHRISTI, TEXAS
GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE,	)	OCTOBER 11, 1991
DEFENDANT.	)	

HEARING ON MOTIONS FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE HAYDEN
W. HEAD, JR., JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT

APPEARANCES FOR:

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THE COURT RECORDER: MS. J. F. ALVAREZ

PROCEEDINGS RECORDED BY
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* * *

[p. 19] be theirs. They don't have a takings claim until they have established title to it and they can't establish title to it unless they can force Commissioner Mauro through their 1983 action or under their *State* versus *Lane* theory, which we also submit is impermissible, to move that boundary so that it becomes their land in effect. That's what they're seeking. And we submit that that is analogous to an award of property to these plaintiffs. This is a case where the State is claiming title, we consider this to be our property, to have Always been our property since the 1800's, and that type of injunctive, what they want to call prospective relief, is in effect taking property from the State and awarding it to the plaintiff.

THE COURT: What alternatives does the plaintiff have to suit here to achieve that goal?

MS. KEENEY: Your Honor, we submit they do not have a right to bring a boundary dispute to move the

boundary without consent of the legislature. They cannot bring it –*

THE COURT: So any time the State wants to claim property, they're immune from suit?

MS. KEENEY: Your Honor, I think that there would be A very different situation if the State were in the position of say going in and actively seeking to acquire something that it has not held since the inception of the grant. This particular area has always been regarded –

[p. 20] THE COURT: So what's the answer to my question? My question was that they had no claim, I mean you said that the State has no courthouse, that you must receive permission of the State of Texas to sue on a land claim. And at that point I said does that mean they can never sue? And you began to say, give me some different, some different facts. Now, I want, I suppose, let's keep, you told me they can't sue here, ever, and I said can anybody sue the State on a title claim without permission of the legislature. What's my answer?

MS. KEENEY: Your Honor, if the State is claiming title, I don't think that an individual can bring a lawsuit against the State without consent of the legislature.

THE COURT: So without regard to the change of circumstances that might exist along the coast of Texas, that once the State of Texas claims it and if the facts change and if the Supreme Court of the State of

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* Emphasis added for purposes of this Appendix.

Texas says, well, the boundary line has been defined improperly by previous adjudications, that that's it, that the State gets to keep the land?

MS. KEENEY: Unless consent is obtained, yes.*

THE COURT: Well, that doesn't seem to have very much procedural due process in it.

MS. KEENEY: Well, Your Honor, under the, under *State* versus *Lane* and under various Supreme Court decisions, and I'd brought another one here to discuss that, that basically that is what the result is. This is not a situation where the [p. 21] State goes in and actively tries to take something away, it is basically holding on to property it has always held. And that that remains, there is no taking, just remains State property unless the boundary is moved, and they're not entitled to bring an action to try to move that boundary.

* * *

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* Emphasis added for purposes of this Appendix.

C-1

Filed June 8, 1993

NO. 490

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION,	§	IN THE
	§	DISTRICT
	§	COURT
Plaintiff,	§	
	§	
VS.	§	OF KENEDY
	§	COUNTY, TEXAS
GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, and THE STATE OF TEXAS,	§	
	§	
	§	105TH JUDICIAL
	§	DISTRICT
Defendants.	§	

DEFENDANTS' BRIEF IN SUPPORT OF THEIR PLEA TO THE JURISDICTION AND SPECIAL EXCEPTIONS

TO THE HONORABLE JUDGE OF THE COURT:

The State of Texas and Garry Mauro, Commissioner of the General Land Office, Defendants herein, file this their Brief in Support of Their Plea to the Jurisdiction and Special Exceptions and show the Court as follows:

A. The doctrine of sovereign immunity bars Plaintiff's action against the Commissioner and its action against the State.

The accepted rule in Texas, as well as throughout the United States, is that the State has governmental immunity from suit and liability. *State v. Hale*, 136 Tex. 29, 146 S.W.2d 731, 735 (1941); *Hosner v. DeYoung*, 1 Tex. 764, 769

(1847). Further, a suit against an agency of the State is, in effect, a suit against the State, and therefore the doctrine of governmental immunity applies to a State agency. *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976); *Department of Public Safety v. Great Southwest Warehouses, Inc.*, 352 S.W.2d 493, 494 (Tex. Civ. App. – Austin 1961, writ ref'd n.r.e.). *See also*, Greenhill & Murto, *Governmental Immunity*, 49 **Texas L. Rev.** 462 (1971). Similarly, a suit against a state official in his official capacity, wherein the plaintiff seeks to impose liability on the State, is barred by the doctrine of sovereign immunity. *W.H. Haden Co. v. Dodgen*, 158 Tex. 74, 308 S.W.2d 838, 840 (1958); *Herring v. Houston Nat'l Exch. Bank*, 113 Tex. 264, 253 S.W. 813, 814 (1923).

The State may not be sued without its consent, and consent may be obtained only through action of the Legislature, either by general law or by resolution or bill in specific instances. *Griffin v. Hawn*, 161 Tex. 422, 341 S.W.2d 151, 152 (1960); *State v. Isbell*, 127 Tex. 399, 94 S.W.2d 423, 424 (1936). Only the Legislature can waive the right of the State to immunity from suit; neither the executive nor judicial branches of the State government may exercise such a power. TEX. CONST. art. II, § 1; *Prairie View A & M Univ. v. Thomas*, 684 S.W.2d 169, 170 (Tex. App.-Houston [14th Dist.] 1984, writ refd n.r.e.). *See also* TEX. GOV'T CODE § 402.004 ("An admission, agreement, or waiver made by the attorney general in an action or suit to which the state is a party does not prejudice the rights of the state.").

In order for the Legislature to waive the sovereign immunity of the State or a State agency, it must do so by clear and unambiguous language. *Duhart v. State*, 610

S.W.2d 740, 742 (Tex. 1980). Such a waiver cannot be inferred or "effected by implication but must be expressly waived." *City of Houston v. Arney*, 680 S.W.2d 867, 875 (Tex. App. – Houston [lst Dist.] 1984, no writ). "Absent an explicit and unequivocal grant of a right or privilege by the State, any ambiguity or obscurity in the terms of a statute must operate in favor of the State." *City of Corpus Christi v. Acme Mechanical Contractors, Inc.*, 736 S.W.2d 894, 906 (Tex. App. – Corpus Christi 1987, writ denied). The Texas Supreme Court recently reaffirmed this principle in *Mount Pleasant I.S.D. v. Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989) ("Only when the Legislature has clearly and explicitly waived the State's sovereign immunity may a cause of action accrue.").

Plaintiffs must allege and prove consent in an action against the State. *Walsh v. University of Texas*, 169 S.W.2d 993, 994 (Tex. Civ. App. – El Paso 1942, writ refd); *Contran Corp. v. Bullock*, 567 S.W.2d 616, 617 (Tex. Civ. App. – Austin 1978, no writ). The court is without jurisdiction to hear the case if there is a failure to allege and prove consent to sue the State. *Walsh*, 169 S.W.2d at 994. The appropriate and proper action on the Plea to the Jurisdiction is dismissal of the suit. *Texas Highway Dept. v. Jarrell*, 418 S.W.2d 486, 488 (Tex. 1967); *State v. Executive Condominiums, Inc.*, 673 S.W.2d 330, 332 (Tex. App. – Corpus Christi 1984, writ ref'd n.r.e.).

Plaintiff seeks a declaratory judgment against the Commissioner that the eastern boundary of its upland grants is the Intracoastal Waterway. Plaintiff relies on *State v. Lain*, 162 Tex. 549, 349 S.W.2d 579 (1961), as authority to maintain this action against the Commissioner. *See* Plaintiffs First Amended Original Petition, p.

9. Such reliance is misplaced. *State v. Lain* was a suit to recover possession, not to acquire title to property. Three factors critical to the Court's holding in *State v. Lain* distinguish that case from the case at bar: 1) the State was not a party to the litigation, 2) the State expressly disclaimed any title to the property at issue, and 3) the plaintiffs held record title to the land in dispute. As evidenced by the pleadings filed by Plaintiff in the present case, each of these critical factors is missing. The State is a party. More importantly, the State claims, and has always claimed, title to the Disputed Land. Finally, Plaintiff's own pleadings show that it does not have record title to the Disputed Land, which has always been recognized as the property of the State. Commissioner Mauro's plea to the jurisdiction with respect to the state-law claims asserted against him should be sustained. The Commissioner claims ownership of the Disputed Land only as the representative of the sovereign. Plaintiffs attempt to adjudicate the State's title to the property, even though brought against a state officer, is a suit against the State and, as Plaintiff concedes in its First Amended Original Petition, Plaintiff has failed to obtain legislative authority to sue the State. Absent such authority, Plaintiff's claims are barred by sovereign immunity. *See Isbell*, 94 S.W.2d at 423. *Bagg v. Univ. of Texas Medical Branch at Galveston*, 726 S.W.2d 582, 584-86 (Tex. App. - Houston [14th Dist.] 1987, writ ref'd n.r.e.). The reasoning in *State v. Executive Condominiums, Inc.*, is controlling here:

> By seeking to wrest ownership from the ministerial representative of the sovereign, appellee is attempting to expand and interfere with the authorized duties of the Commissioner. Thus, this action "is a suit to control the action of the

> State . . . and is therefore in effect a suit against the State, which cannot be maintained, the State not having consented to be sued." (citations omitted)

673 S.W.2d at 333.

Plaintiff's claims of an unlawful taking are barred for all the reasons set forth above. Such claims are predicated on Plaintiff establishing title to the Disputed Land. Unless and until Plaintiff establishes title to the Disputed Land, or some color of title, no takings claim is stated. Plaintiff clearly cannot bring an action to establish boundary and title without legislative consent and it presents no basis for legislative consent in its First Amended Original Petition. A boundary action is maintainable against the State, but Plaintiff has failed and refused to proceed under the appropriate statutory authority. Plaintiff, as well as any other littoral owner of land abutting coastal public land, has a remedy to resolve a legitimate boundary dispute with the State. Section 33.060 of the Texas Natural Resources Code imposes on the State's School Land Board the right "to locate and have marked on the ground the boundaries separating coastal public land from other land." TEX. NAT. RES. CODE § 33.060. Commissioner Mauro, who is Chairman of that Board, has general authority to implement the Board's decisions on the locations of those boundaries. TEX. NAT. RES. CODE §§ 31.051, 32.014. Under § 33.171 of the Natural Resources Code, a littoral owner whose rights "may be affected by any action of the board under [Chapter 33] may bring suit for a declaratory judgment against the State of Texas in a district court in Travis County to try the issues." TEX. NAT. RES. CODE § 33.171.

As this Court is well aware, counsel for Plaintiff is on record in this case stating affirmatively that Plaintiff is not proceeding under that statute. Therefore, Plaintiffs claims asserted herein are barred in their entirety.

B. Plaintiff's federal claims are not subject to the Jurisdiction of this Court.

Plaintiffs own pleadings acknowledge that its federal claims are pending in the Fifth Circuit. Plaintiff's federal claims rest in the federal court by virtue of Defendants' removal of this action to federal court. It is well established that removal of a case from state court to federal court ends the power of the state court to act upon the matters removed. *National Steam-Ship Co. v. Tugman*, 106 U.S. (16 Otto) 118, 1 S. Ct. 58, 27 L.Ed. 87 (1882); *E.D. Systems Corp. v. Southwestern Bell Tel. Co.*, 674 F.2d 453, 457 (5th Cir. 1982). The state court's jurisdiction over the federal claims has never been restored by the federal court – only the state law claims were remanded to state court. Therefore, this Court has no jurisdiction to proceed on the federal claims, and Plaintiff's pleadings of those matters should be ordered stricken. *See E.D. Systems*, 674 F.2d at 458; *Adair Pipeline Co. v. Pipeliners Local Union No. 798*, 325 F.2d 206 (5th Cir. 1963).

C. Plaintiff has no valid basis for recovery of attorney's fees.

Plaintiff seeks recovery of attorney's fees on the basis of 42 U.S.C. § 1988 and the Texas Declaratory Judgment Act found in Section 37.009 of the Texas Civil Practices &

Remedies Code. Plaintiff's federal basis for recovery of attorney's fees is barred for the reasons previously set forth regarding the federal court's jurisdiction of the federal claims. It is well established that Section 37.009 does not constitute a waiver of immunity from attorney's fees. *Waugh v. City of Dallas*, 814 S.W.2d 492, 496-97 (Tex. App. – Dallas 1991, writ denied). Attorney's fees are not recoverable unless provided for by statute or contract between the parties. *New Amsterdam Casualty Co. v. Texas Indus., Inc.*, 414 S.W.2d 914, 915 (Tex. 1967). Plaintiff has neither a statutory basis nor a contract providing for recovery of attorney's fees. Therefore, Plaintiff's pleadings seeking recovery of attorney's fees should be stricken.

D. Plaintiff has no basis for recovery of damages.

Plaintiff seeks recovery of damages in the instant suit based on its takings claims. As set forth previously, Plaintiff has stated no valid takings claims because title to the Disputed Land is and has always been held by the State. Plaintiff sets forth no proper consent to suit for damages and no statutory mechanism for their payment. Therefore, Plaintiff's action for damages is barred. *Perry v. Texas A & I Univ.*, 737 S.W.2d 106 (Tex.App. – Corpus Christi 1987, writ refd n.r.e.).

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully pray that Plaintiff's action be dismissed and, alternatively, that Defendants' special exceptions be sustained and that Plaintiff recover nothing by its action and for such other and further relief both at

law and in equity, to which the Defendants may show themselves entitled.

Respectfully submitted,
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D-1

Filed July 26, 1993

NO. 490

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION, Plaintiff,	§	IN THE DISTRICT COURT
VS.	§	OF KENEDY
GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, and THE STATE OF TEXAS, Defendants.	§	COUNTY, TEXAS
	§	105TH JUDICIAL DISTRICT

ORDER

On the 11th day of June, 1993, came on to be heard the Special Exceptions and Plea to the Jurisdiction filed by Garry Mauro, Commissioner of the General Land Office, and the State of Texas, Defendants in the above-styled and numbered cause. This Court, having considered the pleadings and the argument of counsel, is of the opinion and finds that the Special Exceptions and Plea to the Jurisdiction should be and hereby are sustained. Because of the disposition of the jurisdictional plea, it is not necessary for Plaintiff to replead.

IT IS, THEREFORE, ORDERED, that Plaintiff's action be and hereby is dismissed in its entirety for want of jurisdiction.

SIGNED this 22nd day of July, 1993.

/s/ J. Manuel Banales
J. Manuel Banales
Judge, 105th District Court

NO. 92-7714

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION,

Plaintiff-Appellant,

v.

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, AND THE STATE OF TEXAS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

POST-SUBMISSION BRIEF OF APPELLANT THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION

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October 1, 1993

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* * *

TO THE HONORABLE COURT OF APPEALS

Appellant, The John G. and Marie Stella Kenedy Memorial Foundation (the "Foundation"), submits this post-submission brief in accordance with the court's request at oral argument.

During oral argument in the cause on September 9, 1993, this Court asked the parties to address three issues: (1) the applicability to the instant case of this Court's treatment of the *Ex parte Young* doctrine in *Hirtz v. State of Texas*, 974 F.2d 663 (5th Cir. 1992), dealing with the Texas Open Beaches Act; (2) the events in and status of the state court lawsuit that involved the state law claims remanded to state court by the United States District court, and the implications for the Foundation's federal

claims at issue here; and (3) this Court's ability to order a remand of the Foundation's federal claims, if reinstated, under 28 U.S.C. § 1441(c), with particular reference to several decisions cited by the Court.

The Foundation will first briefly summarize the federal and state law claims it has asserted in this litigation. Next, the three issues outlined by the court will be addressed.

* * *

B. RESPONSE TO COURT'S INQUIRIES: THE FOUNDATION ASSERTED VALID FEDERAL CLAIMS AND THOSE CLAIMS SHOULD NOW BE REMANDED TO STATE COURT.

* * *

2. The Disposition of the State Law Claims in State Court, if Anything, Confirms the Availability of the Federal Claims.

In January 1990, the Foundation initiated this suit in state court, where all the state and federal claims could be considered together. Defendants removed this cause to federal court, where it remained for almost three years. The Foundation began discovery in federal court and assumed that, since Defendants had sought this forum and had not urged Eleventh Amendment immunity, all of the claims could be adjudicated together there. Even Defendants' motion for summary judgment, which eventually led to the order of dismissal, did not assert Eleventh Amendment immunity except as to the *Ex parte*

Young claim against Mauro (R. 773-774), which the Eleventh Amendment does not bar. Only later did Defendants assert the Eleventh Amendment as a bar to all claims. (R. 331,145).

When the district court remanded the state law claims to state court in October 1992, the Foundation knew there was no basis for challenging the remand on appeal. Defendants do not contend that any such basis exists.

Since the Foundation has been attempting for many years to obtain redress, during which time Defendants have continued to derive all revenue from the disputed land, and because the Foundation knew Defendants would contend that even the state law claims were barred by sovereign immunity, the Foundation decided to try to prosecute the state court suit. The Foundation's fears about Defendants' intent to block even the state court claims proved correct, as the state law claims recently have been dismissed on Defendants' plea of sovereign immunity.

(a) *Repleading of federal claims in state court.* This Court inquired at oral argument whether the Foundation considered reasserting the federal claims in state court, since the Eleventh Amendment obviously does not operate there. Indeed, the Foundation did consider that avenue, but was concerned about two possible actions: either Defendants would merely remove the suit once more, or, more likely, they would contend that the United States District Court's order of dismissal barred the reassertion of those claims.

The Foundation amended its state court pleading and made reference to the federal claims as a means for preserving the possible availability of those claims, but acknowledged that they had been dismissed by the United States District Court and that the dismissal was being challenged on appeal. (See Tab 5, p. 2 n. 1 in the compilation of state court pleadings and orders submitted with this brief for the Court's use). Even this neutral reference to the status of the federal claims, however, was objected to by Defendants: "The federal courts have exclusive jurisdiction of these federal claims and plaintiff is barred from pursuing these claims in the state courts." (Tab 11, p. 2, ¶ C). In its July 22, 1993 order dismissing the state court suit, the state district court also sustained Defendants' objection to the Foundation's reference to the federal claims. (Tab 15).

(b) *Defendants' effort to abate state court suit.* On February 1, 1993, Defendants moved to abate the state court proceedings pending a resolution of the instant appeal. (Tab 1, p. 3). The Foundation opposed this motion, for the reasons stated above. (Tab 8). By order signed April 6, 1993, the state district court denied Defendants' motion to abate. (Tab 10).

(c) *Defendants' motion to transfer venue and contention about the availability of declaratory relief.* In a February 1, 1993 motion, Defendants sought a transfer of venue for adjudication of the state law claims from Kenedy County, where the disputed land is located, to Travis County. (Tab 1, p. 1). Defendants first contended that the transfer of venue was mandatory, but that the doctrine of sovereign immunity still barred the Foundation's claims. (Tab 4, pp. 2-3). Apparently recognizing the lack of logic in that

position, Defendants then filed another brief raising, *for the first time ever*, the argument that the Foundation could obtain declaratory relief against the State. (Tab 7, p. 2).[4]

The Foundation responded by demonstrating that the statute cited by Defendants does not authorize suit by the Foundation and does not govern this dispute. (Tabs 3 and 6). (See the Texas authorities cited later by Defendants, mandating strict and narrow construction of Texas statutes waiving sovereign immunity, which were used by Defendants to argue immunity from the state law constitutional claims, Tab 12, pp. 1-2, for which legislative permission is not required.). The state district court agreed with the Foundation, and, after a hearing on March 29, 1993, denied Defendants' motion to transfer venue by order dated April 6, 1993. (Tab 9). After dismissal of the suit, in its denial of the Foundation's motion for reconsideration the state district court again reiterated that the statute cited by Defendants does not govern this dispute. (Tab 17).

(d) *The sustaining of Defendants' sovereign immunity contention.* In their answer, Defendants asserted "pleas to the jurisdiction" and "special exceptions" which contended that the Foundation's state law claim against Mauro and its state law taking claim against the state are

---

[4] At about the same time as Defendants made their novel assertion in state court, they made a similar contention for the first time on appeal in this cause. (Brief of Appellees, p. 20). Defendants always had contended previously, and they represented to the United States District Court, that, without special legislative consent, the Foundation has *no recourse whatever*. (VI Tr. 19-21, 27).

barred by the doctrine of sovereign immunity. (Tab 11, pp. 1-3). The Foundation opposed Defendants' sovereign immunity contentions, relying, for example, on *State v. Lain* and *Steele v. City of Houston*, quoted on page 3. (Tab 14, pp. 2-3). The state district court heard arguments on the pleas to the jurisdiction and special exceptions on June 11, 1993. On July 22, 1993, the state district court signed an order sustaining the special exceptions and pleas to the jurisdiction and dismissing the state court suit. (Tab 15). The Foundation moved for reconsideration of the state district court's order on August 19, 1993. (Tab 16). The state district court denied the motion for reconsideration by order dated September 14, 1993. (Tab 17).

Although the Foundation is in the process of appealing the dismissal of the state court suit and believes the order of dismissal should be reversed, the state court's action highlights the importance of the federal constitutional safeguards relied on by the Foundation. The federal claims were valid and properly pleaded when they were first raised, and the need for their reinstatement has, if anything, been made more imperative as a result of the state court's recent action.

(e) *Interpleader suits.* Two mineral lessees of the state recently have filed interpleader suits in Travis County, interpleading funds due under the leases and acknowledging the dispute between the Foundation and Defendants. (Tabs 18 and 19). The Foundation and Defendants have answered those suits. (Tabs 19 and 21). As stated above, the state district court in Kenedy County has ruled that the statute cited by Defendants, requiring venue in Travis County, does not govern this dispute. Moreover, that statute does *not* allow the full range of relief that is

provided by the state and federal constitutional claims relied upon by the Foundation.

* * *

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NO. 92-7714

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION,

Plaintiff-Appellant,

v.

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, AND THE STATE OF TEXAS,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas
Corpus Christi Division

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Dated: October 14, 1993

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TO THE HONORABLE COURT OF APPEALS:

Appellees, Garry Mauro, Commissioner of the General Land Office, and the State of Texas ("Defendants"), submit this brief in response to the Post-Submission Brief of Appellant, the John G. and Marie Stella Kenedy Memorial Foundation ("Foundation"). At oral argument, the

Court requested that the parties address the issues listed below.

* * *

ARGUMENT AND AUTHORITIES

* * *

B. The state court proceedings and the state court remedies available to the Foundation compel a determination that the Foundation has stated no federal claims ripe for review.

The Foundation has provided this Court with copies of the pleadings in state court. It omitted the answers filed by the Defendants in the two state court interpleader actions filed in Travis County. Copies of these answers are included in the Supplemental Index attached hereto. A review of these state court actions and the remedies available to the Foundation in state court establishes that, should this Court not be persuaded that *Pennhurst* bars the Foundation's actions, the Foundation's federal claims should nevertheless be dismissed for lack of ripeness.

The Foundation seeks to characterize its claim as one involving a federal constitutional claim that turns on state property law and analogizes its due process claim to inverse condemnation or taking cases. Should this Court be inclined to view the Foundation as having a legitimate due process claim, it is nevertheless premature and not currently maintainable in the federal courts. The Supreme Court's decision in *Williamson Co. Regional Planning*

Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108 (1985), establishes that neither a claim of taking of property for public use without compensation nor a claim of deprivation of property without due process of law is ripe for review in the federal courts if state remedies are available. In *Williamson Co.*, the Supreme Court expressly rejected the argument that a Section 1983 claim is an exception to this rule:

> Respondent asserts that it should not be required to seek variances from the regulations because its suit is predicated upon 42 U.S.C. § 1983, and there is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action. The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable. (citations omitted).

Williamson Co., 473 U.S. at 192, 105 S. Ct. at 3119.

The Supreme Court in *Williamson Co.* set out an additional reason that a taking claim is not reviewable if state court procedures are available:

> A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so. The Fifth Amendment does not proscribe the taking of property, it proscribes taking without just compensation. Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a "reasonable, certain and adequate provision for obtaining compensation" exist at the

> time of the taking. If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking. Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Williamson Co., 473 U.S. at 194-5, 105 S. Ct. at 3120-21. (citations omitted).

This Court has applied the principles of *Williamson Co.* in *Samaad v. City of Dallas*, 940 F.2d 925 (5th Cir. 1991), and in *Smith v. City of Brenham*, 865 F.2d 662 (1989). *Samaad* is particularly on point. In *Samaad*, this Court found Texas procedures for remedying an inverse condemnation adequate. 865 F.2d at 935. *Smith* is also supportive of dismissal in this case in that this Court therein ruled that a due process claim under the Fourteenth Amendment was premature. 865 F.2d at 664.

The Foundation may respond to Defendants' unripeness contention by noting that the State has successfully defended against the Foundation's taking claim filed in state court by asserting sovereign immunity. That is true. The State's argument, however, is not that a valid taking claim is without remedy in the state courts. Rather, the State has consistently contended that the Foundation has no taking claim because the Foundation has not properly

brought, nor has it prevailed in, a boundary or title action against the State. Excerpted below is a passage from the State's brief in support of its jurisdictional plea in state court:

> Plaintiff's claims of an unlawful taking are barred for all the reasons set forth above. Such claims are predicated on Plaintiff establishing title to the Disputed Land. Unless and until Plaintiff establishes title to the Disputed Land, or some color of title, no takings claim is stated. Plaintiff clearly cannot bring an action to establish boundary and title without legislative consent and it presents no basis for legislative consent in its First Amended Original Petition. A boundary action is maintainable against the State, but Plaintiff has failed and refused to proceed under the appropriate statutory authority. Plaintiff, as well as any other littoral owner of land abutting coastal public land, has a remedy to resolve a legitimate boundary dispute with the State. Section 33.060 of the Texas Natural Resources Code imposes on the State's School Land Board the right "to locate and have marked on the ground the boundaries separating coastal public land from other land." TEX. NAT. RES. CODE § 33.060. Commissioner Mauro, who is Chairman of that Board, has general authority to implement the Board's decisions on the locations of those boundaries. TEX. NAT. RES. CODE §§ 31.051, 32.014. Under § 33.171 of the Natural Resources Code, a littoral owner whose rights "may be affected by any action of the board under [Chapter 33] may bring suit for a declaratory judgment against the State of Texas in a district court in Travis County to try the issues." TEX. NAT. RES. CODE

> § 33.171. As this Court is well aware, counsel for Plaintiff is on record in this case stating affirmatively that Plaintiff is not proceeding under that statute. Therefore, Plaintiff's claims asserted herein are barred in their entirety.

(Foundation's Index of State Court Pleadings, Tab 12, pp. 4-5).

The Foundation has claimed it has no right to sue under Chapter 33 of the Texas Natural Resources Code. As set out in the above-quoted brief, the statute plainly provides for such right.[2] The authorization to sue in Chapter 33 is very similar to that provided under the Open Beaches Act Section 61.019(a) of the Texas Natural Resources Code provides comparable authorization to sue to littoral owners affected by the Open Beaches Act: "A littoral owner whose rights are determined or affected by this subchapter ['Access to Public Beaches'] may bring suit for a declaratory judgment against the state to try the issue or issues." TEX. NAT. RES. CODE § 61.019(a). See *Hirtz*, 974 F.2d at 666 (recognizing existence of remedy in

---

[2] The Foundation has never attempted to utilize this statutory provision but criticizes Defendants for not raising the existence of the statute sooner (see the Foundation's postsubmission brief at 14). Defendants demur to the suggestion that they had an obligation to provide the Foundation with a road map for its own lawsuit. In any event, such blame casting should not be a concern of this Court. The question of ripeness is a matter of jurisdictional consequence that can be raised at any time. *Samaad*, 940 F.2d at 934 (ripeness held to be a jurisdictional requirement that cannot be waived). *See also Reno v. Catholic Social Services, Inc.*, ___ U.S. ___, 113 S.Ct. 2485, 2495, n.18 (1993) (Court raised ripeness on its own motion).

state court but holding that waiver of sovereign immunity did not authorize suit in federal court).

The State's position that no taking has occurred, however, in no way deprives the Foundation of a forum. The Foundation has vigorously asserted and argued in state court that Article I, § 17 of the Texas Constitution is, in and of itself, a grant of authority to sue for a taking claim. (Foundation's Index of State Court Pleadings, Tab 13, p. 2). The State's position is that no taking can exist unless and until the Foundation effects a legal change in the current boundary location of the Disputed Land.[3] The Foundation has a state forum in which to challenge that position. That Defendants dispute the validity of the Foundation's claims does not deprive the Foundation of access to the state courts, including access to appellate review of the lower court's rulings. Further, the State has expressly acknowledged in the state district courts in both Kenedy and Travis Counties that a party may bring a suit to determine boundary and title to coastal public land against the State of Texas in Travis County. (Foundation's Index of State Court Pleadings, Tab 12, pp. 4-5, State's Supplemental Index of State Court Pleadings, Tab

---

[3] The Foundation's own federal court pleadings implicitly recognize the validity of the State's position:

> This is a suit against Garry Mauro in his official capacity as Commissioner of the General Land Office under 42 U.S.C. § 1983 and the Due Process clause of the Fourteenth Amendment to the United States Constitution and under state law, *for declaratory and injunctive relief to determine boundary and title to certain real property*. (Plaintiff's First Amended Complaint, R IV 602) (emphasis added).

1, p. 2-3, and Tab 2, p. 2-3). Therefore, the Foundation has a procedure through which it may litigate its boundary dispute, should it choose to use it. The availability of these remedies renders unripe any procedural due process, substantive due process, or taking without just compensation claim by the Foundation and, under the Supreme Court's decision in *Williams Co.*, necessitates dismissal of the Foundation's federal claims.

Federal court review is, of course, ultimately still available to the Foundation. Should utilization of the state judicial system result in a judgment in favor of the Defendants, the Foundation would have the right to seek review of the state court rulings on its taking claim through the filing of a petition for certiorari in the Supreme Court. Such a review is, in fact, the normal process through which taking claims against state or local entities are subjected to federal court review. *See, e.g., Lucas v. South Carolina Coastal Council*, ___ U.S.___ 112 S.Ct. 2886 (1992); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646 (1978); *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581 (1897).

* * *

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G-1

Filed May 5, 1993

NO. 9305265

BRIGHT & COMPANY, Plaintiff, V. GARRY MAURO, Commissioner of The General Land Office, and THE STATE OF TEXAS, and THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION Defendants.	§ § § § § § § § § § §	IN THE 200 JUDICIAL DISTRICT COURT OF TRAVIS COUNTY, TEXAS

PETITION IN INTERPLEADER AND FOR DECLARATORY RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now BRIGHT & COMPANY, A Texas Partnership (hereinafter referred to as "Bright") and files this its Petition in Interpleader and for Declaratory Relief, and would respectfully show unto the Court, as follows:

I.

PARTIES

Bright is a Texas general partnership.

Garry Mauro, Commissioner of the General Land Office of Texas, is an individual and officer of the State of Texas and may be served with process herein by serving him at the Stephen F. Austin Building, 1700 N. Congress, Austin, Texas 78701.

The State of Texas may be served by serving the Honorable Dan Morales, Attorney General of the State of Texas at the Supreme Court Building, Austin, Texas 78701.

The John G. and Marie Stella Kenedy Memorial Foundation (the "Foundation") is a charitable foundation under Texas law, with its principal offices in Corpus Christi, Nueces County, Texas. The Foundation may be served by serving the Most Reverend Rene H. Gracida, President of the Foundation, at 1020 First City Tower II, Corpus Christi, Nueces County, Texas 78478.

Corpus Christi Diocese of the Roman Catholic Church is a charitable institution. The Diocese may be served with process by serving Bill Tagliabue, Property Manager, 1200 Lantana, Corpus Christi, Nueces County, Texas.

(Garry Mauro, as Commissioner of the General Land Office of Texas, the State of Texas, the Foundation and the Diocese are collectively referred to hereinafter as "Defendants.")

II.

JURISDICTION AND VENUE

This Court has jurisdiction over this matter in that the amount in controversy is in excess of $1000, and is a suit for declaratory relief under TEX. CIV. PRAC. & REM. CODE § 37.003.

Sovereign immunity is not applicable to this action. In addition, Texas Natural Resources Code, §§ 33.171 and

33.173 evidence the Legislature's intention to give consent to suits such as this action. *Missouri Pacific R. Co. v. Brownsville Nav. Dist.*, 453 S.W. 2d 812, 813 (Tex. 1970).

Venue is proper in Travis County.

III.

FACTUAL BACKGROUND

On or about October 2, 1990, Garry Mauro, as Commissioner of the General Land Office of the State of Texas, executed Oil and Gas Lease No. M-94218, leasing Tract 331, Laguna Madre, Kenedy County, Texas, containing approximately 220 acres, as shown on the official map of Kenedy County, on file in the General Land Office, Austin, Texas, to Bright. A true and correct copy of said Oil and Gas Lease is attached hereto as Exhibit "A" and made a part hereof for all purposes.

On or about October 2, 1990, Garry Mauro, as Commissioner of the General Land Office of the State of Texas, executed Oil and Gas Lease No. M-94219, leasing Tract 332, Laguna Madre, Kenedy County, Texas, containing approximately 720 acres, as shown on the official map of Kenedy County, on file in the General Land Office, Austin, Texas, to Bright. A true and correct copy of said Oil and Gas Lease is attached hereto as Exhibit "B" and made a part hereof for all purposes.

On or about April 7, 1992, Garry Mauro, as Commissioner of the General Land Office of the State of Texas, executed Oil and Gas Lease No. M-94914, leasing Tract 323, Laguna Madre, Kenedy County, Texas, containing approximately 450 acres, as shown on the official map of

Kenedy County, on file in the General Land Office, Austin, Texas, to Bright. A true and correct copy of said Oil and Gas Lease is attached hereto as Exhibit "C" and made a part hereof for all purposes.

IV.

On or about October 2, 1991, the Foundation executed an Oil and Gas Lease, leasing Tracts 331 and 332, Laguna Madre, Kenedy County, Texas, containing approximately 940 acres, as shown on the official map of Kenedy County, Texas, on file in the General Land Office, Austin, Texas, to Bright. A true and correct copy of said Oil and Gas Lease is attached hereto as Exhibit "D" and made a part hereof for all purposes.

On or about April 7, 1992, the Foundation executed an Oil and Gas Lease, leasing Tract 323, Laguna Madre, Kenedy County, Texas, containing approximately 450 acres, as shown on the official map of Kenedy County, Texas, on file in the General Land Office, Austin, Texas, to Bright. A true and correct copy of said Oil and Gas Lease is attached hereto as Exhibit "E" and made a part hereof for all purposes.

Subsequently, the Foundation assigned the Diocese 15% of the royalty from its Oil and Gas Leases.

V.

In all the Oil and Gas Leases, royalties for oil and gas are to be paid by May 5, 1993 and May 15, 1993 respectively. Each Oil and Gas Lease, Exhibits "A" through "E" herein, has a proportionate reduction clause, which

reduces the undivided interests in the lands conveyed to that interest which the Lessor actually owns, and proportionately reduces Bright's payments called for in each of the Oil and Gas Leases.

VI.

Mauro and the State of Texas, on the one hand, and the Foundation and Diocese, on the other hand, each contend that they each own all of the mineral fee estate underlying the lands leased by Exhibits "A" through "E" herein.

VII.

On or about January 17, 1990, the Foundation commenced litigation against Mauro and the State of Texas in the 105th Judicial District Court of Kenedy County, Texas, in Cause No. 490, wherein the Foundation has contended that it owned all of the minerals which have been leased to Bright & Company by virtue of Exhibits "D" and "E". Mauro and the State of Texas have denied same, and have alleged that the State owns the minerals. Upon information and belief, the issue as to ownership of the Tracts in question is pending before that Court, wherein both sides have filed motions for summary judgment, attempting to dispose of said issues.

VIII.

PLEA OF INTERPLEADER

A dispute has arisen between the Defendants. Each group claims to own all of the undivided interest of the

minerals leased to Bright in the Tracts described in the Oil and Gas Leases. The dispute is whether the tracts are submerged lands owned by the State or uplands owned by the Foundation. Thereby each claims to be entitled to 100% of the royalties to be paid.

IX.

The claims of the Defendants are adverse and conflicting. Bright is unable to decide the validity of either of said claims and Bright is unable to decide whom it should pay.

With respect to future royalties payable under the leases, Bright is in the position of an innocent stakeholder faced with the possibility of double liability and the costs incident thereto.

X.

Bright neither has nor claims any interest in the royalties payable under said Oil and Gas Leases, and has, at all times, been willing to pay the same to such person or persons as are lawfully entitled thereto.

XI.

Bright has in no way colluded with either of the Defendants concerning the matters of this cause; Bright is not in any manner indemnified by either of said Defendants; and Bright has filed this Petition in Interpleader of its free will to avoid double liability and unnecessary suits and the costs incident thereto.

XII.

Bright hereby deposits the sum of $499.95, being the entire royalties due the entire undivided mineral fee ownership of the lands leased by Exhibits "A: through "E,"[1] which is the subject of the conflicting claims with the District Clerk of Travis County upon the filing of this petition. Bright moves the Court to order that said sums be deposited in interest bearing accounts, including, but not limited to, certificates of deposit of lengths not to exceed six months. Bright intends to deposit all future royalties which would be payable under Exhibits "A" through "E" herein with the Clerk of this Court at such times as such obligations become due and owing.

XIII.

Bright has employed the undersigned counsel to institute this petition for interpleader and to prosecute it to an end and has agreed to pay for said services, reasonable attorney's fees as the Court shall allow.

---

[1] Bright's deposit of royalty, and its future deposits of royalty, are calculated based on the royalties due under the leases without any deduction of severance taxes. In the event that the State of Texas is determined to be the owner of the mineral fee estate, then no severance taxes are due from the deposits and the State of Texas would be entitled to the entirety of the royalty award. In the event the Foundation and Diocese are determined to be the owners of the mineral fee estate, a sum for severance taxes would need to be deducted from the award and paid over to the Comptroller.

XIV.

DECLARATORY RELIEF

Pursuant to TEX. CIV. PRAC. & REM. CODE § 37.004 (a), Bright, being a person interested under the Oil and Gas Leases, and Bright's rights, status and other legal relations being affected by the Oil and Gas Leases, seeks determination of questions of construction arising under the Oil and Gas Leases, and Section 52.028 of the Texas Natural Resources Code and to obtain a declaration of rights, status or other legal relations thereunder.

Bright seeks declaratory relief with respect to a construction of the Oil and Gas Leases, Exhibits "A" through "E" herein, as to the ownership of the mineral interests of the Defendants and the application of the proportionate reduction clauses therein, respecting the proportionate interests in delay rentals and royalties which may be due to Mauro and the State of Texas under Exhibits "A" through "C" and due the Foundation under Exhibits "D" and "E."

Pursuant to TEX. CIV. PRAC. & REM. CODE § 37.004(b), a contract may be construed either before or after there has been a breach.

XV.

All persons who have or claim any interests that would be affected by the declaration are made parties herein.

XVI.

Bright further seeks declaratory relief as to the proper construction of TEX. NAT. RES. CODE § 52.028. TEX. NAT. RES. CODE 52.028 provides:

> "(a) If an oil and gas lease issued by the commissioner is involved in litigation relating to its validity or to the authority of the commissioner to lease the land, *the primary term of the lease shall be suspended and all obligations imposed by the lease shall be set aside during the period of the litigation.*
>
> . . . (c) *The lessee shall pay all delay rentals and any royalties that accrue during the period of litigation in same manner as they are to be paid under the lease during the term.* If the delay rentals are not paid as the lease requires, the lease shall not automatically terminate; however, the delay rentals continue to be an obligation and debt owned by the lessee. The delay rentals paid during the period of litigation shall be held and returned to the lessee if the state is unsuccessful in the litigation." (Emphasis added).

As noted hereinabove, under § 52.028, the aforesaid provisions are ambiguous. While subpart (a) refers to the primary term of the lease being suspended and all obligations imposed by the lease set aside during the period of the litigation, subpart (c) provides that the failure to pay delay rentals would not cause the lease to automatically terminate, but continue to be an obligation. By implication, subpart (c) may be improperly construed to mean that payment of royalties during said period of time may result in the automatic termination of the lease, whereas subpart (a) provides that all obligations imposed by the lease are set aside during the period of litigation. Further,

subpart (c) provides only that delay rentals would be returned if the State was unsuccessful in litigation, whereas, royalties paid under said provision by implication would not have to be repaid. Bright seeks a declaration construing Section 52.028, subparts (a) and (c), so as to clarify the patent and latent ambiguities in the statute by reason of the interplay of the two subsections and that payment through interpleader into the registry of this Court is not in violation of Section 52.028 or result in termination of the oil and gas leases (Exhibits A through C).

XVII.

Bright moves the Court to award costs and reasonable and necessary attorney's fees as are equitable and just to Bright in prosecuting this declaratory relief.

XVIII.

Bright prays for further relief under TEX. CIV. PRAC. & REM. CODE, § 37.001 that the Court order that until this Court determines the proportionate interest of Mauro and the State of Texas on the one hand, and the Foundation on the other hand, in the minerals subject to the Oil and Gas Leases, Exhibits "A" through "E" herein, that the obligations of Bright under all said leases be suspended, until final determination of said issues herein, those royalties and other payments which are otherwise due and payable to Mauro and the State of Texas on the one hand, and the Foundation on the other hand, under their respective Oil and Gas Leases (Exhibits "A" through "E") and further moves the Court to give reasonable notice to

Defendants by requiring such Defendants to show cause why such relief should not be granted forthwith.

WHEREFORE, PREMISES CONSIDERED, Bright requests that Defendants be cited to appear and answer herein, interpleading their conflicting claims to the delay rentals and royalty payments in order to settle their respective rights thereto, and on final trial hereof, that Bright have judgment for the following relief:

(1) That Bright be released and discharged from all liability to Defendants or either of them on account of, or in any way arising out of, the payment of royalties into the Registry of the Court, in lieu of payments made pursuant to the terms and provisions of the respective Oil and Gas Leases;

(2) That the District Clerk be ordered to place those disputed sums which Plaintiff delivers to the Registry of the Court into interest bearing accounts, including, but not limited to certificates of deposit with terms of six months or less;

(3) That Bright have and recover a reasonable fee for the services of their attorneys, together with all costs of court and expenses incurred by Bright in this behalf;

(4) That Bright obtain declaratory relief as to the respective ownership interests of Mauro and the State of Texas on the one hand, and the Foundation, on the other hand, in the minerals described in the Oil and Gas Leases, Exhibits "A" through "E" herein, declaring the undivided percentage of delay rentals which are payable to Mauro and the State of Texas, on the one hand, under Exhibits "A" through "C" and the percentage of delay rentals and

royalties payable to the Foundation under Exhibits "E" and "F," pursuant to the proportionate reduction clauses contained in all said Oil and Gas Leases;

(5) That Bright obtain declaratory relief as to the proper construction of TEX. NAT. RES. CODE § 52.028 (a) and (c), as set forth hereinabove;

(6) That Bright obtain supplemental relief under Section 37.011, that the rights and remedies of Mauro and the State of Texas on the one hand, and the Foundation, on the other hand, under the Oil and Gas Leases, Exhibits "A" through "E," with respect to payments, including royalties thereunder, be suspended prior to a court's determination of the respective ownership interests of those parties in the minerals in the Tracts described in Exhibits "A" through "E," conditioned upon Bright timely paying into the registry of the Court the delay rentals and royalties under the Oil and Gas Leases which would represent payments based on all of the undivided interest in minerals in the Tracts, but no greater percentage;

(7) Bright recover reasonable attorney's fees and costs pursuant to TEX. CIV. PRAC. & REM CODE § 37.009; and

(8) Such other and further relief, both general and special, at law or in equity, to which Bright may show itself justly entitled.

Respectfully submitted,

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(214) 742-3700

Facsimile No. (214) 748-5521
BY: /s/ F. Franklin Honea
F. Franklin Honea
State Bar No. 09934300
Robert B. Payne, Jr.
State Bar No. 15662100

ATTORNEYS FOR BRIGHT & CO.

Filed August 11, 1993

NO. 9309578

EXXON CORPORATION, Plaintiff, V. GARRY MAURO, Commissioner of the General Land Office, THE STATE OF TEXAS, THE KENEDY MEMORIAL FOUNDATION, and THE CORPUS CHRISTI DIOCESE OF THE ROMAN CATHOLIC CHURCH, Defendants.	§ § § § § § § § § § § § § §	IN THE DISTRICT COURT TRAVIS COUNTY, TEXAS 353 JUDICIAL DISTRICT

PETITION IN INTERPLEADER AND FOR DECLARATORY RELIEF

I.

PARTIES

1.1 Exxon Corporation ("Exxon") is a foreign corporation organized and existing under the laws of the state of New Jersey. Exxon has its principal place of business in Dallas County, Texas.

1.2 Garry Mauro, Commission of the General Land Office of Texas ("Mauro"), is an officer of the State of Texas and may be served with process herein by serving him at the Stephen F. Austin Building, 1700 N. Congress, Austin, Texas 78701.

1.3 The State of Texas (the "State") may be served by serving the Honorable Dan Morales, Attorney General

of the State of Texas, at the Supreme Court Building, Austin, Texas 78701.

1.4 The John G. and Marie Stella Kenedy Memorial Foundation (the "Foundation") is a charitable foundation existing under the laws of the State of Texas with its principal offices in Corpus Christi, Nueces County, Texas. The Foundation may be served by serving the Most Reverend Rene H. Gracida, President of the Foundation, 1020 First City Tower II, Corpus Christi, Nueces County, Texas.

1.5 The Corpus Christi Diocese of the Roman Catholic Church (the "Diocese") is a charitable institution. The Diocese may be served with process by serving Bill Tagliabue, Property Manager, 1200 Lantana, Corpus Christi, Nueces County, Texas.

II.

VENUE

2.1 Venue is proper as to the State and Mauro in Travis County pursuant to Section 33.171 and Section 33.172(3) of the Texas Natural Resources Code. Alternatively, venue is proper in Travis County under Section 15.001 of the Texas Civil Practices and Remedies Code inasmuch as Travis County is the county of residence for the State and Mauro.

2.2 Venue is proper as to the Foundation and Diocese in Travis County pursuant to Section 15.061 of the Texas Civil Practice and Remedies Code.

III.

JURISDICTION

3.1 Section 33.171 of the Texas Natural Resources Code waives the sovereign immunity of the State and Mauro.

IV.

STATEMENT OF FACTS

4.1 Both the State and the Foundation claim title to certain coastal lands known as the "mud flats" along the Laguna Madre in Kenedy County, Texas. Exxon desired to explore for oil and gas under the mud flats. Both the State and the Foundation claimed title to the minerals under the mud flats and both were willing to grant leases to Exxon. In view of the conflicting claims to the minerals under the mud flats, Exxon obtained leases from both the State and the Foundation.

4.2 The State has taken the position that the mud flats are coastal public lands, a position disputed by the Foundation. Exxon, by reason of its leases from the State and the Foundation, owns minerals under the mud flats and, by reason of other leases with the Foundation, owns mineral under land bordered by or contiguous to the mud flats.

4.3 On or about April 2, 1991, Garry Mauro, as Commissioner of the General Land Office of the State of Texas, executed Oil and Gas Lease No. M-94474, covering Tract No. 286, Laguna Madre, Kenedy County, Texas, containing approximately 370 acres, as shown on the official map of Laguna Madre on file in the General Land

Office, Austin, Texas, to Exxon. A true and correct copy of the Oil and Gas Lease is attached hereto as Exhibit "A".

4.4 On or about April 2, 1991, Garry Mauro, as Commissioner of the General Land Office of the State of Texas, executed Oil and Gas Lease No. M-94475, covering Tract No. 287, Laguna Madre, Kenedy County, Texas, containing approximately 680 acres, as shown on the official map of Laguna Madre on file in the General Land Office, Austin, Texas, to Exxon. A true and correct copy of the Oil and Gas Lease is attached hereto as Exhibit "B".

4.5 On or about April 2, 1991, Garry Mauro, as Commissioner of the General Land Office of the State of Texas, executed Oil and Gas Lease No. M-94478, covering Tract No. 293, Laguna Madre, Kenedy County, Texas, containing 640 acres, as shown on the official map of Laguna Madre on file in the General Land Office, Austin, Texas, to Exxon. A true and correct copy of the Oil and Gas Lease is attached hereto as Exhibit "C".

4.6 On or about April 2, 1991, Garry Mauro, as Commissioner of the General Land Office of the State of Texas, executed Oil and Gas Lease No. M-94479, covering Tract No. 294, Laguna Madre, Kenedy County, Texas, containing 640 acres, as shown on the official map of Laguna Madre on file in the General Land Office, Austin, Texas, to Exxon. A true and correct copy of the Oil and Gas Lease is attached hereto as Exhibit "D".

4.7 On or about April 2, 1991, Garry Mauro, as Commissioner of the General Land Office of the State of Texas, executed Oil and Gas Lease No. M-94481, covering Tract No. 304, Laguna Madre, Kenedy County, Texas, containing 640 acres, as shown on the official map of

Laguna Madre on file in the General Land Office, Austin, Texas, to Exxon. A true and correct copy of the Oil and Gas Lease is attached hereto as Exhibit "E".

4.8 On or about August 31, 1991, the Foundation executed an Oil and Gas Lease covering Tracts 286, 287, 293, 294 and 304, Laguna Madre, Kenedy County, Texas, as shown on the official map of Kenedy County, Texas, on file in the General Land Office, Austin, Texas, to Exxon. A true and correct copy of the oil and Gas Lease is attached hereto as Exhibit "F".

4.9 The Foundation, Mauro and the State are currently involved in litigation over ownership of the mineral estate of the mud flats. The lawsuit is styled *The John G. and Marie Stella Kenedy Memorial Foundation v. Garry Mauro, Commission of the General Land Office and the State of Texas*, Cause No. 490, in the District Court of Kenedy County, Texas, 105th Judicial District (the "Mud Flats Lawsuit"). On information and belief, the Kenedy County court has entered an order that it lacks jurisdiction in the Mud Flats Lawsuit. Also on information and belief, the order will likely be appealed. Tracts 286, 287, 293, 294 and 304 are part of the area where the ownership is in dispute.

4.10 In May of 1993, a productive well was drilled on Tract No. 286. Pursuant to the terms of the foregoing leases, Exxon is obligated to pay royalties on production from that well. Because of the title dispute between the State and the Foundation, however, Exxon is uncertain under which lease to pay – that granted by the State or that granted by the Foundation. The State has threatened to invoke the forfeiture provision of its lease should

Exxon not pay royalties directly to the State or deposit them with the Court in an interpleader action.

4.11 In the future, Exxon may drill productive wells on one or more of the other tracts to which both the State and the Foundation claim title and which both have leased to Exxon. Until title to the disputed mud flats is resolved, Exxon will not know to whom royalties which may accrue in the future or other payments which may become due under the leases should be paid.

V.

INTERPLEADER

5.1 The State of Texas and the Foundation each claim to be the owner of the disputed tracts and the delay rentals and royalties accruing under leases covering the same land. The Diocese also asserts an ownership interest in the disputed royalties.

5.2 These claims are adverse and conflicting. Exxon is unable to decide the validity of any of the claims and is unable to decide whom it should pay. With respect to the money in its possession, Exxon is in the position of an innocent stakeholder facing the possibility of multiple liability and costs incident thereto.

5.3 Exxon neither has nor claims any interest in the royalties which the State, the Foundation and the Diocese claim. Until final resolution of the title dispute between the State and the Foundation over the mud flats, Exxon will not know which of its leases are enforceable.

5.4 Exxon has not colluded with any of the parties concerning the matters of this case. Exxon has filed this

petition in interpleader of its own free will to avoid multiple liability and unnecessary suits and costs incident thereto.

5.5 Exxon has deposited $24,973.04 with the District Clerk, representing the disputed royalty proceeds accrued as of the date of the filing hereof. Exxon will deposit with the District Clerk all future delay rentals and royalties which become due and payable under the leases covering Tract No. 286 until further order or final judgment of the Court. Exxon requests an order permitting Exxon to deposit into the Court Registry all future delay rentals, royalties or other sums due under any of the leases in connection with future operations, if any, conducted by Exxon on any other disputed tract within the mud flats. These funds shall constitute the Fund.

5.6 Exxon request that the State, Mauro, the Foundation and the Diocese interplead any and all claims which each may have against the Fund. Exxon requests that it be discharged from further liability under the terms of the aforesaid leases with respect to all such payments made by Exxon into the Fund.

5.7 Exxon has employed legal counsel to institute the petition for interpleader and is entitled to reasonable attorneys' fees as the Court shall allow.

VI.

DECLARATORY RELIEF

6.1 As contemplated by Sections 33.171 and 33.172 of the Texas Natural Resources Code, Exxon requests a

determination of title to land claimed by the State to be coastal public land.

6.2 With respect to the Foundation and the Diocese, Exxon is entitled to declaratory relief under the Uniform Declaratory Judgments Act, Section 37.001 et seq. of the Texas Civil Practices and Remedies Code.

WHEREFORE, PREMISES CONSIDERED, Exxon requests that the defendants be cited to appear and interplead their right, title and claim to the Fund in order to settle all claims to royalties, delay rentals or other payments due under the terms of any of the leases described herein. Exxon further requests the following relief:

1. that with respect to deposits made by Exxon into the Fund, Exxon be discharged from all further liability to any defendant for royalties, delay rentals or other sums due under the terms of the leases;

2. that the Fund be maintained in interest bearing accounts, including, but not limited to, certificates of deposit;

3. that Exxon recover reasonable attorneys' fees and costs; and

4. that Exxon have such other and further relief, including declaratory, to which Exxon may show itself entitled.

Respectfully submitted,

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ATTORNEY FOR EXXON CORPORATION

Filed July 20, 1994

NO. 9309578

BRIGHT & COMPANY, Plaintiff, vs. GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, THE STATE OF TEXAS, THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION, and THE CORPUS CHRISTI DIOCESE OF THE ROMAN CATHOLIC CHURCH, Defendants.	§	IN THE DISTRICT COURT TRAVIS COUNTY, TEXAS 200TH JUDICIAL DISTRICT

FIRST AMENDED ANSWER AND CROSS-CLAIM OF DEFENDANT, THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION

TO THE HONORABLE JUDGE OF THIS COURT:

The John G. and Marie Stella Kenedy Memorial Foundation ("the Foundation") files this first amended answer and cross-claim.

I.

ADMISSIONS AND GENERAL DENIAL

1.1 The Foundation admits the allegations in paragraph X of the Petition, insofar as Plaintiff alleges that it

neither has nor claims any interest in the royalties or delay rentals payable under the subject oil and gas leases. The Foundation further admits that it has and does make a claim to the subject funds, as alleged in paragraph VIII of the Petition. The Foundation hereby exercises its right under Rule 92 to generally deny each and every other allegation contained in the Petition and respectfully requests that Plaintiff be required to prove the charges and allegations against the Foundation by a preponderance of the evidence.

II.

PLAINTIFF IS NOT AN INNOCENT STAKEHOLDER

2.1 The Foundation specifically denies the allegation in paragraph IX of the Petition that Plaintiff is in the position of an innocent stakeholder. The Foundation therefore denies that Plaintiff is entitled to recover any attorney's fees or costs.

III.

OWNERSHIP OF FUNDS

3.1 The Foundation further alleges that it is entitled to recover of and from Plaintiff and Defendants Garry Mauro, Commissioner of the General Land Office, and the State of Texas and be awarded all disputed sums or funds which have been or may be deposited by Plaintiff into the registry of this Court, together with interest, as allowed by law, for the following reasons.

3.2 On or about October 2, 1991, the Foundation executed an oil and gas lease in favor of Plaintiff, leasing

tracts 331 and 332, Laguna Madre, Kenedy County, Texas, containing approximately 940 acres, as shown on the official map of Kenedy County, Texas, on file in the General Land Office, Austin, Texas. A true and correct copy of that oil and gas lease is attached to the Petition as Exhibit "D," incorporated therein by reference, and likewise incorporated in this pleading by reference.

3.3 On or about April 7, 1992, the Foundation executed an oil and gas lease in favor of Plaintiff, leasing tract 323, Laguna Madre, Kenedy County, Texas, containing approximately 450 acres, as shown on the official map of Kenedy County, Texas, on file in the General Land Office, Austin, Texas. A true and correct copy of that oil and gas lease is attached to the Petition as Exhibit "E," incorporated therein by reference, and likewise incorporated in this pleading by reference.

3.4 The approximately 1,390 acres covered by these two oil and gas leases are owned in fee simple by the Foundation as a part of the original Spanish and Mexican Grants, La Barreta and Las Motas de la Barreta, which are owned in fee simple by the Foundation. Therefore, the Foundation owns and is entitled to receive any and all royalties, delay rentals and any other lease benefits which are due and payable under the oil and gas leases between the Foundation and Plaintiff. The Foundation therefore asserts its claim to all disputed sums or funds which have been or may be deposited by Plaintiff into the registry of this Court, together with interest, as allowed by law.

IV.

CROSS-ACTION

4.1 This is a suit against the State of Texas ("State" or "Cross-Defendant") under the Texas Natural Resources Code §§ 33.171-.172 and the Texas Uniform Declaratory Judgments Act, Chapter 37 of the Civil Practice & Remedies Code, to determine boundary and title to certain real property, and under the Fifth and Fourteenth Amendments to the United States Constitution for the inverse condemnation, taking and damaging of the Foundation's real property without just compensation.

V.

PARTIES

5.1 *Cross-Claimant.* The Cross-Claimant is The John G. and Marie Stella Kenedy Memorial Foundation, a charitable foundation with its principal office in Corpus Christi, Nueces County, Texas.

5.2 *Cross-Defendant.* The Cross-Defendant is the State of Texas. Cross-Defendant State has previously filed an answer and has thus already appeared in this action.

VI.

ALLEGATIONS ESTABLISHING CAUSES OF ACTION

6.1 Cross-Defendant State refuses to recognize, and in fact is unable to identify, the proper location of the boundary between the Foundation's property and state-owned submerged land or coastal public land in Kenedy County, Texas and the ownership of a certain tract of

land, which is referred to in this cross-action as the "Disputed Land." The Disputed Land is a part of the Kenedy Ranch owned by the Foundation. The Disputed Land is described by metes and bounds in the legal description appended as Exhibit 1 and is depicted on the map appended as Exhibit 2, both of which exhibits are incorporated by reference in this cross-action. Cross-Defendant State has asserted as the boundary of the Foundation's property a line contiguous with the western boundary of the Disputed Land (which boundary is hereafter referred to as "the State's line").

6.2 The Foundation's claim concerning the eastern boundary of the Disputed Land and concerning its ownership of the Disputed Land, as set forth in the preceding paragraph and subsequent paragraphs, is expressly made subject to that portion of an easement in the United States of America in the surface estate that lies to the east of the existing right-of-way line consisting of approximately two hundred (200) acres of land, for the purpose of maintaining the adjacent Intracoastal Canal. The United States' surface easement is more particularly described in an instrument entitled *Spoil Disposal and Right-of-Way Easement Deed* granted by the Arroyo Colorado Navigation District to the United States on August 21, 1947 and filed of record at Volume 5, pages 233-235 of the Deed Records in Kenedy County, Texas.

6.3 The Foundation has derived its ownership of the Disputed Land from original Spanish and Mexican grants, La Barreta and Las Motas de La Barreta, which are commonly known as the Big Barreta and the Little Barreta, respectively. These grants provide for a riparian or littoral boundary, the Laguna Madre, as the eastern

boundary for those grants. Thus, the Foundation is a "littoral owner" under Tex. Nat. Res. Code § 33.004(12). In 1958, the Supreme Court of Texas more specifically defined the boundary of riparian lands washed by the tides as the vertical elevation of mean higher high water. *Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167, at 187, 191 (1958).

6.4 Cross-Defendant State does not contest the Foundation's ownership of the land within the Big Barreta and Little Barreta grants lying to the west of the Disputed Land. However, Cross-Defendant State has refused to recognize the Foundation's title to any part of the Disputed Land. The Foundation has asserted and continues to assert that, as a riparian or littoral owner, it is entitled to ownership and possession of the land to the intersection of the vertical elevation of mean higher high water of the Laguna Madre with the surface slope of its mainland grants; all of the Disputed Land is above the vertical elevation of mean higher high water, and all of the Disputed Land is owned in fee simple by the Foundation. Therefore, a controversy exists between the Foundation and Cross-Defendant State as to the proper location and description of the current boundary between the Foundation's privately-owned property and property claimed by Cross-Defendant State of Texas.

6.5 The Foundation has caused a study to be made of ground and water conditions in the vicinity of the Disputed Land by M. L. Claunch and William N. Lothrop, Registered Professional Land Surveyors, and has caused a survey to be made on the ground by them. The results of that study and survey verify that all of the Disputed

Land lies above any proper value for the vertical elevation of mean higher high water in the vicinity of the Disputed Land, and thus confirm the validity of the Foundation's claim to the Disputed Land. The Foundation shared the results of the Claunch and Lothrop survey with officers and employees acting under the authority and supervision of Cross-Defendant State and Defendant Mauro. Officers and employees acting under the authority and supervision of Defendant Mauro inspected the Disputed Land with representatives of the Foundation. Nevertheless, Cross-Defendant State refuses to recognize the Foundation's ownership of the Disputed Land.

6.6 Notwithstanding that the Disputed Land is privately-owned upland, lying above the boundary defined by the highest court of the State of Texas, Cross-Defendant State has continued to exercise possession, dominion and control over the Disputed Land to the exclusion of the Foundation. Cross-Defendant State has continued to show the Disputed Land on official state maps as being state-owned submerged tracts and available for lease from the state. The Disputed Land, as described in Exhibit 1, has located within its boundaries all or portions of the following "state lease tracts":

281	295	311	332	351
283	296	316	333	352
284	297	317	334	359
285	301	318	335	360
286	302	319	336	361
287	303	320	343	362
288	304	321	344	363
289	305	322	345	364
290	306	323	346	365
291	307	324	347	366

292	308	325	348	367
293	309	330	349	368
294	310	331	350	377

Cross-Defendant State's claim of ownership, failure to recognize the proper boundary and actions in depicting the Disputed Land as state-owned land constitute a cloud on the Foundation's title to the Disputed Land.

6.7 The denial of the Foundation's rights and the deprivation of its property will continue unless terminated by judgment of this Court. The Foundation requests that this Court determine and declare that all of the Disputed Land is above the vertical elevation of mean higher high water of the Laguna Madre, that the eastern boundary of the Disputed Land constitutes the eastern boundary of the Big Barreta and Little Barreta grants, and that the Foundation is the owner of the Disputed Land. In the alternative, in the event the Court should determine that the Claunch and Lothrop line is not the proper location of the eastern boundary of the Foundation's property, then it should declare and determine an alternative line within the Disputed Land based upon all the evidence adduced, and grant declaratory relief accordingly.

6.8 Cross-Defendant State has taken and/or damaged for or applied to public use all of the mineral and surface estates within the Disputed Land, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Cross-Defendant State, by and through its agents and other representatives, has physically entered the Disputed Land at different times and has deprived the Foundation of its use of its property and of benefits from the property. Cross-Defendant State

wrongfully has received bonuses, delay rentals, royalties, and other payments as a result of its leasing, in whole or in part, of the "state lease tracts" identified above. The Foundation repeatedly has notified Cross-Defendant State of its claim to the Disputed Land and repeatedly has protested Cross-Defendant State's leasing of the Disputed Land, yet Cross-Defendant State has ignored the Foundation's claim and protests, and has persisted in leasing the Disputed Land and accepting lease payments, refusing even to deposit such payments into the registry of this Court, an escrow account, or other similar account.

6.9 Because the Foundation owns title to the Disputed Land, Cross-Defendant State was and is without any right or authority to use or lease any portion of the Disputed Land or to receive any of the above-mentioned payments. The Foundation has been damaged as a result of the payments to Cross-Defendant State, and Cross-Defendant State has received unauthorized windfalls. Cross-Defendant State therefore should be required to account for any and all payments received by it as a result of the lease or use of any portion of the Disputed Land, and all such payments should be awarded to the Foundation. Alternatively, the Foundation should be awarded the diminution in market value of the Foundation's real property caused by Cross-Defendant State's taking and damaging.

VII.

REQUEST FOR DECLARATORY RELIEF AND ATTORNEYS' FEES

7.1 The Foundation incorporates by reference the allegations contained in the paragraphs above.

7.2 The Foundation petitions the Court pursuant to the Texas Uniform Declaratory Judgments Act, Chapter 37 of the Civil Practice & Remedies Code of Texas, and sections 33.171-.172 of the Texas Natural Resources Code.

7.3 The Foundation respectfully requests that the Court determine and declare the legal rights and relationship, if any, and the interests of the Foundation and Cross-Defendant State in the Disputed Land. The Foundation also requests that the Court declare that Cross-Defendant State's use, possession and occupancy of the Disputed Land violate the United States Constitution, that the Disputed Land lies above the line of mean higher high tide and is therefore privately-owned land belonging to the Foundation, and not coastal public land belonging to Cross-Defendant State, and that Cross-Defendant State has committed a wrongful taking of the Foundation's property entitling the Foundation to an award of just compensation.

7.4 The Foundation has retained the law firm of McGinnis, Lochridge & Kilgore, L.L.P. to represent the Foundation in this action and has agreed to pay the firm costs and reasonable and necessary attorney's fees. An award of reasonable and necessary attorney's fees to the Foundation would be equitable and just and is authorized by section 37.009 of the Texas Civil Practice & Remedies Code.

VIII.

REQUEST FOR JURY TRIAL

8.1 The Foundation hereby demands trial of this entire action by a jury.

PRAYER

WHEREFORE, the Foundation prays:

(a) Upon trial of this cause, that this Court order, adjudge and determine, as against Cross-Defendant State of Texas, that the cloud cast upon the Foundation's title to the Disputed Land be removed and that the Foundation is the owner of the Disputed Land, as described in Exhibit 1, subject to the rights and interest of the United States of America in the surface easement discussed and identified in this cross-action. Such judgment should be based upon the Court's determination that, subject to future changes, the eastern boundary of the Disputed Land as described in Exhibit 1 and shown on Exhibit 2 is the eastern boundary of the grants, commonly known as the Big Barreta and the Little Barreta, owned by the Foundation. Alternatively, if such not be the location of the eastern boundary, then the same should be determined by the Court.

(b) Upon trial of this cause, that this Court order, adjudge and determine, as against Cross-Defendant State of Texas, that since the Foundation owns the Disputed Land in its entirety in fee simple, the Foundation be awarded just compensation for Cross-Defendant State's wrongful taking of the Foundation's property, including

but not limited to an award of all payments made to the State of Texas as a result of Cross-Defendant State's use or lease of all or any portion of the Disputed Land, or, alternatively, the diminution in market value of the Foundation's real property caused by Cross-Defendant State of Texas' taking and damaging.

(c) Upon trial of this cause, that this Court order, adjudge and determine, as against Plaintiff Bright & Company and Defendants Garry Mauro, Commissioner of the General Land Office, and the State of Texas, that Plaintiff and Defendants Garry Mauro, Commissioner of the General Land Office, and the State of Texas take nothing by this suit and the Foundation recover of and from Plaintiff and Defendants Garry Mauro, Commissioner of the General Land Office, and the State of Texas and be awarded all disputed sums or funds which have been or may be deposited by Plaintiff into the registry of this Court, together with interest, as allowed by law.

(d) That the Foundation be awarded all costs and reasonable attorney's fees.

(e) That the Foundation be awarded both pre-judgment and post-judgment interest, as allowed by law.

(f) That the Foundation have such other and further relief, in law or in equity, to which it may show itself entitled.

Respectfully submitted,

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No. 94-574

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In The

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October Term, 1994

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION,

Petitioner,

vs.

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE, AND THE STATE OF TEXAS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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No. 94-574

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THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION,

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

In order to address an issue that Respondents the State of Texas (the "State") and Garry Mauro ("Mauro"), Commissioner of the General Land Office, raised in their Brief in Opposition, Petitioner The John G. and Marie Stella Kenedy Memorial Foundation (the "Foundation") respectfully submits this Reply in support of its Petition for a writ of certiorari.

ARGUMENT

I. By Ignoring the Uncertainty of Any State Law Theory of Liability and of Any State Forum by Which the Foundation May Present Its Claims to the Disputed Land, the Fifth Circuit Rendered a Decision That Is Contrary to the Jurisprudence of this Court and of Other Circuits.

Respondents blandly assert that Tex. Nat. Res. Code § 33.171 provides the Foundation with a theory and a forum by which to adjudicate title to the Disputed Land. On the contrary, nothing could be less certain.

In looking askance at the Foundation's officer suit against Mauro under 42 U.S.C. § 1983, the Fifth Circuit completely ignored why such lawsuits aimed at adjudicating rights in property were first created and why they are now so rare. Under federal law, a claimant in the Foundation's position could bring an action for just compensation or money damages under the Tucker Act, 28 U.S.C. §§ 1346, 1491. Consequently, a suit in the nature of an equitable quiet title action against a federal officer based upon the reasoning of *United States v. Lee*, 106 U.S. (16 Otto) 196, 208-09, 1 S. Ct. 240, 250-51, 27 L. Ed. 171 (1882) would not lie, because the claimant would not have been deprived of its property without due process of law. The clear and obvious waiver of sovereign immunity that the Tucker Act provides renders officer suits unnecessary. *Larson v. Domestic & Foreign Service Corp.*, 337 U.S. 682, 696-705, 697 n. 18, 69 S. Ct. 1457, 1464-69, 1465 n. 18, 93 L. Ed. 1628 (1949).

Many states have their own versions of the Tucker Act that waive sovereign immunity in like manner. Examples include New York, N.Y. Ct. Cl. Act §§ 1-30; Ohio, Ohio Rev. Code § 2743.01 to .72; and Illinois, Ill. Comp. Stat. ch. 705, §§ 505/1 to 29. When a state provides a forum and a remedy for a claimant in the Foundation's position, then a procedural due process claim against a state official under § 1983 based on the reasoning of *Tindal v. Wesley*, 167 U.S. 204, 221-23, 17 S. Ct. 770, 777-78, 42 L. Ed. 137 (1897) and of *Ex parte Young*, 209 U.S. 123, 159-60, 28 S. Ct. 441, 454, 52 L. Ed. 714 (1908) is not necessary. By waiving sovereign immunity plainly, the state has afforded the claimant due process. *Toledo, Peoria & Western R. Co. v. State of Illinois, Dept. of Transp.*, 744 F.2d 1296, 1297, 1299 (7th Cir. 1984), *cert. denied*, 470 U.S. 1051, 105 S. Ct. 1751, 84 L. Ed. 2d 815 (1985).

Texas has absolutely no analogue to the Tucker Act.

The Tucker Act (like many of its state law counterparts) waives sovereign immunity only for purposes of money damages, not equitable relief. *See United States v. Testan*, 424 U.S. 392, 397-98, 96 S. Ct. 948, 952-53, 47 L. Ed. 2d 114 (1976). If a claimant in the Foundation's position were to seek simply an adjudication of title and prospective equitable relief (rather than just compensation) against the federal government, its remedy would not be a *Lee*-style officer suit, but rather a proceeding against the United States itself under the Quiet Title Act, 28 U.S.C. § 2409a. This statute clearly waives sovereign immunity and allows for equitable relief of the sort the Foundation now seeks against Mauro.

Many states have their own versions of the Quiet Title Act that permit an adjudication of title as against the state. Examples include Arizona, Ariz. Rev. Stat. §§ 12-1101 to -1104; *see Land Dept. v. O'Toole*, 154 Ariz. 43, 46-47, 739 P.2d 1360, 1363-64 (Ariz. App. 1987); Idaho, Idaho Code § 6-401; *see Lyon v. State*, 76 Idaho 374, 376, 283 P.2d 1105, 1106 (Idaho 1955); and New Mexico, N.M. Stat. §§ 42-6-12 to -17; *see Brosseau v. New Mexico State Hwy. Dept.*, 92 N.M. 328, 330-31, 587 P.2d 1339, 1340-41 (N.M. 1978). In these jurisdictions, such unequivocal waivers of sovereign immunity would provide a claimant with due process and obviate the need for an officer suit.

Texas has absolutely no analogue to the Quiet Title Act.

All that Texas has is Tex. Nat. Res. Code § 33.171. That statute provides:

> (a) A littoral owner whose rights may be affected by any action of the [School Land B]oard may bring suit for a declaratory judgment against the State of Texas in a district court in Travis County to try the issues.
>
> (b) Service of citation may be obtained by serving the [C]ommissioner [of the General Land Office].

Chapter 33 of the Texas Natural Resources Code, of which this provision is a part, pertains only to the surface estate in state-owned submerged lands and to the management of that surface estate by the School Land Board (the "Board"). Tex. Nat. Res. Code §§ 33.001(a), 33.002. In particular, Chapter 33 authorizes the Board to lease and grant permits for the use of state-owned submerged land.

The dispute in this case, however, pertains primarily to the mineral estate in the Disputed Land. It is not at all clear that Tex. Nat. Res. Code § 33.171 permits an action for declaratory judgment with respect to the mineral estate.

Although Tex. Nat. Res. Code § 33.171 waives the State's sovereign immunity as to *something*, it is anything but certain that it provides the Foundation with a means by which to present all of its claims to the Disputed Land. Under Texas law, sovereign immunity is jurisdictional, and waivers of sovereign immunity are construed *strictissimi juris*. *E.g.*, *Mount Pleasant I.S.D. v. Estate of Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989); *Duhart v. State*, 610 S.W.2d 740, 742 (Tex. 1980). Judged by this standard, there are many arguments that Tex. Nat. Res. Code § 33.171 does not waive sovereign immunity in this case. Doubts about the efficacy of this statute can only increase when one considers that no Texas appellate court has ever construed it. Indeed, to the best of the knowledge of the Foundation's attorneys, the Texas Attorney General never has relied on this statute, and no Texas trial court has ever had occasion to construe the statute, even though it was enacted in 1973.

The Foundation spent years seeking the consent of the Texas Legislature to bring a suit to adjudicate the proper littoral boundary. Neither the Foundation nor Respondents nor any member of the Legislature ever believed that this quest for legislative consent was rendered superfluous by Tex. Nat. Res. Code § 33.171. Indeed, Respondents themselves never suggested that this statute had any relevance to the Foundation's claims

until after the United States District Court for the Southern District of Texas had remanded the Foundation's state law causes of action to the state court in Kenedy County, where the Disputed Land is situated. Respondents then claimed that venue was proper in Travis County, where the seat of government is located, rather than in Kenedy County, but that sovereign immunity deprived *any* state court of jurisdiction to consider the Foundation's case. Suddenly awakening to the absurdity of this position, Respondents exhumed Tex. Nat. Res. Code § 33.171.

As Respondents note, the interpleader suits that the State's mineral lessees have filed in the Travis County state court have been consolidated, and the State has moved for summary judgment on the Foundation's cross-claim. To date, Respondents have not raised sovereign immunity in the interpleader action. There is no guarantee, however, that sovereign immunity will not be raised as a bar to adjudicating the Foundation's rights in the Disputed Land under Tex. Nat. Res. Code § 33.171. Texas rules of pleading do not require a cross-claim defendant to file an answer to the cross-claim setting forth all the factual contentions and affirmative defenses on which the cross-claim defendant proposes to reply.

Under Texas law, subject matter jurisdiction may not be established by any form of waiver or estoppel. *Abderholden v. Morizot*, 856 S.W.2d 829, 832 (Tex. App. – Austin 1993, no writ); *Gorman v. Life Ins. Co. of N. Am.*, 752 S.W.2d 710, 713 (Tex. App. – Houston [14th Dist.] 1988), *aff'd in part, rev'd in part on other grounds*, 811 S.W.2d 542 (Tex. 1991), *cert. denied*, ___ U.S. ___ 112 S. Ct. 88, 116 L. Ed. 2d 60 (1991). In particular, the Attorney General of Texas may not waive the State's sovereign immunity,

which is a bar to subject matter jurisdiction. *Department of Public Safety of Texas v. Great Southwest Warehouses, Inc.*, 352 S.W.2d 493, 494-95 (Tex. Civ. App. – Austin 1961, writ ref'd n.r.e.). Indeed, subject matter jurisdiction (including a waiver of sovereign immunity) may not even be conferred by judicial estoppel. *See Board of Educ. of City of Chicago v. Box*, 191 Ill. App. 2d 31, 35-36, 547 N.E.2d 627, 630 (1989); *Avalon Distrib., Inc. v. P.S. Operations, Inc.*, 76 Ohio App.3d 615, 616-17, 602 N.E.2d 758, 759 (1991), *jurisdictional motion overruled*, 63 Ohio St. 3d 1474, 591 N.E.2d 243 (1992).

While there is no certainty that sovereign immunity will bar an adjudication of the Foundation's claim under Tex. Nat. Res. Code § 33.171, neither is there any certainty that sovereign immunity will not close the courthouse doors against the Foundation. Nothing would prevent Respondents from raising sovereign immunity at any time, and certainly nothing would prevent the trial court – or any Texas appellate court – from raising the question of subject matter jurisdiction *sua sponte*.

The Fifth Circuit, having received post-submission briefing on the tortured procedural history of this case, knowing fully how effectively Respondents were using sovereign immunity in state courts, and having been apprised of the uncertainty of any remedy under Tex. Nat. Res. Code § 33.171, nonetheless affirmed the dismissal of the Foundation's § 1983 claim. Indeed, the Fifth Circuit did not deem the tenuous status of a state law forum or remedy to be of any particular importance.

In taking this position, the Fifth Circuit's holding was flatly contrary to the decisions of this Court and of other

Circuits. The very reason that officer suits of this nature are now so rare is that the federal government – and many states – offer a clear-cut waiver of sovereign immunity. The Tucker Act (and its state law counterparts) and the Quiet Title Act (and its state law counterparts) leave no room for question that a claimant in the Foundation's position may vindicate its rights to disputed property against the sovereign. Tex. Nat. Res. Code § 33.171 does nothing of the kind.

This Court has long held that a state may not block the doors of every courthouse, leaving a violation of federally guaranteed rights with only a doubtful remedy. *General Oil Co. v. Crain*, 209 U.S. 211, 226-27, 28 S. Ct. 475, 480, 52 L. Ed. 754 (1908). The Fifth Circuit turned its back on this reasoning. If Texas courts should ultimately hold that Tex. Nat. Res. Code § 33.171 does not afford the Foundation a theory and a forum – and this outcome is entirely possible – then there would be a right without a remedy, and despotism would hold sway in Texas. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803).

When federal officers hold a citizen's property under color of the government's claim of right, and when the Tucker Act or the Quiet Title Act do not provide an obvious and unequivocal remedy, judicial review is still deemed essential, and federal courts have searched high and low for any basis for jurisdiction. *See, e.g., United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993) (citing *United States v. Lee, inter alia*). By the same token, when state officials hold a citizen's property under the state's claim of right, and when there is no "little Tucker Act" or

"little Quiet Title Act" in sight, an officer suit based on *Ex parte Young* and *Tindal v. Wesley* is well laid.

CONCLUSION

By ignoring the very rationale for the judicial recognition of an officer suit when rights in property are at issue, and by ignoring the very reason for the current rarity of suits such as the Foundation has brought, the Fifth Circuit rendered a decision that undercuts the jurisprudence of this Court and of other Circuits. Accordingly, a writ of certiorari should issue to review the holding of the Court of Appeals.

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